Law and Practice of the Obligations of the Carrier over the Cargo

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The Hague-Visby Rules

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by

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Groningen, June 2016

Ilian Djadjev

In memory of my grandfather, Iliya Guev

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TABLE OF ABBREVIATIONS

ADHGB	Allgemeine Deutsche Handelsgesetzbuch (General German Commercial Code)
AIMU	American Institute of Marine Underwriters
AMD	Association Mondiale de Dispacheurs
ANSI	American National Standards Institute
ASA	American Standards Association
B/L	Bill of Lading
BIMCO	Baltic and International Maritime Council
BOL	Bill of Lading
BTS	Bureau of Transportation Statistics
C&F	Cost and Freight
CFR	Cost and Freight
CFS	Container Freight Station
CIF	Cost, Insurance and Freight
CMI	Comité Maritime International
COA	Contract of Affreightment
COGSA	Carriage of Goods by Sea
CSC	Container Safety Convention
CSCL	China Shipping Container Line
CY	Container Yard
D&D	Demurrage and Detention
DWT	Deadweight Tonnage
EGHB	Einführungsgesetz zum HGB (Introductory Law to the Commercial Code)
FAS	Free Alongside Ship
FCA	Free Carrier
FCL	Full Container Load
FEU	Forty-Foot Equivalent
FI	Free In
FILO	Free In Liner Out
FILTD	Free In Liner Terms Discharge
FIO	Free In and Out
FIOS	Free In and Out Stowed
FIOSLSD	Free In and Out Stowed, Lashed, Secured and Dunnaged

FIOST	Free In and Out Stowed and Trimmed
FIOT	Free In and Out Trimmed
FIS	Free In and Stowed
FISLO	Free In Stowed Liner Out
FLO/FLO	Float-on/Float-off
FO	Free Out
FOB	Free on Board
HBG	Handelsgesetzbuch (Commercial Code)
ICC	International Chamber of Commerce
ICS	International Chamber of Shipping
ILA	International Law Association
IMDG	International Maritime Dangerous Goods Code
IMF	International Monetary Fund
IMO	International Maritime Organization
IMSBC	International Maritime Solid Bulk Cargoes Code
ISM	International Safety Management
ISO	International Organization for Standardization
JIML	Journal of International Maritime Law
LCL	Less than Container Load; Less-than-carload
LIFO	Liner In Free Out
LO/LO	Lift-on/Lift-off
LTL	Less-than-truckload
MAIB	UK Maritime Accident Investigation Branch
MARPOL	International Convention for the Prevention of Pollution from Ships
MOPOG	Russian Regulations for Carriage of Dangerous Goods by Sea
MSC	(1) Maritime Safety Committee (IMO); (2) Mediterranean Shipping Company;
NOR	Notice of Readiness
NVOCC	Non-vessel Operating Common Carrier
NYPE	New York Produce Exchange
OOG	Out of gauge Cargo
P&I	Protection and Indemnity
PSL	Practical storage life
RORO	Roll-on/roll-off (RORO or ro-ro)
SCN	Supreme Court of the Netherlands
SDR	Special Drawing Rights

SIDS	Small Island Developing States
SLAC	Shippers Load, Stow and Count
SOLAS	International Convention for the Safety of Life at Sea
STC	Said to Contain
STO-RO	Stow and Row
TEU	Twenty-Foot Equivalent
TNPA	Transnet National Port Authority (South Africa)
UCP	Uniform Customs and Practice for Documentary Credits
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
VGM	Verified Gross Mass
WO/WO	Walk-on/Walk-off

Introduction

We could hardly imagine the global economy the way it functions today, had it not been for ships and the shipping industry. Sea transport forms by far the largest share in international trade[1] and its importance and volume have been constantly growing in the last century. Only in the period 2000-2010, world seaborne trade increased from 23 trillion to about 33 trillion ton-miles,[2] to reach about 50 trillion ton-miles in 2014, while steady growth was observed throughout all that period except for the years of 2008 and 2009, the latter attributable to the economic and financial turmoil at that time.[3] In a nutshell, there is no other means of transport capable of moving immense quantities of cargo over great distances so efficiently and at such a low cost.[4]

The focus of the current academic thesis will be the legal and contractual obligations of a sea carrier relating to the care for the cargo. This subject deserves research and critical analysis for several reasons. To begin with, the practical importance of the duties to load, handle, stow, carry, keep, care for and discharge the goods carried should not be underestimated. Within the claim's portfolio of a given P&I Club, the cargo claims form the biggest share.[5] On average, every year more than 30% of all claims involve cargo.[6] These claims may be for loss, damage, shortage or misdelivery of the goods, and the most frequent causes appear to be structural or operational flaws, theft or negligence of the stevedores upon loading or discharging as well as poorly prepared holds or tanks.

Furthermore, today's complex shipping arrangements make it increasingly difficult to outline the sphere of obligations and responsibilities of a common ocean

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[1] Nowadays about 90% of world trade is transported by sea. Source: International Maritime Organization (IMO), http://www.imo.org/

[2] A unit measuring freight transportation (sometimes referred to as "transportation work") equivalent to a ton of goods transported over one mile. Source UNCTAD secretariat. See '*Review of Maritime Transport 2011*', United Nations Conference on Trade and Development (UNCTAD), http://unctad.org/en/docs/rmt2011ch1_en.pdf and '*Review of Maritime Transport 2014*', United Nations Conference on Trade and Development at http://unctad.org/en/PublicationChapters/rmt2014ch1_en.pdf. The numeric notion "trillion" is employed here within the meaning of the short scale that is commonly applied nowadays both in the US and, since 1974, in the UK to designate a thousand billions (10^{12}), where the latter stands for a thousand millions (10^{9}). Therefore, 50 trillion cargo ton-miles are to be understood as 50 000 billion cargo ton-miles.

[3] The increase can be generally attributed to the ceaseless expansion of world population, increasing industrialization, liberalization of national economies as well as due to the emerging economies of developing countries. Last but not least, shipping is the most fuel-efficient and carbon-friendly form of transport.

[4] Cargo means any commodity (*e.g.* raw materials, products, foodstuffs, timber), which enters the transportation chain.

[5] A P&I Club represents an association of shipowners that have grouped together in order to insure each other's third-party liability on a mutual and non-profit basis. Thus, a P&I Club is an insurance association which provides international marine insurance, best known as protection and indemnity (P&I) insurance. This third-party liability insurance is done through risk pooling, providing information and representation for the members of the Club, the latter being shipowners, vessel operators and demise charterers. In other words, the Club is on the shipowners' side against third parties who bring claims to the P&I members. The P&I Club is different from a conventional insurance company, because all P&I clubs are a mutual, meaning that they identify themselves closer to their members' interests, and are not driven by the profit motive. Where others insurance companies report to shareholders, P&I clubs report to their members.

[6] 'Steamship Mutual' report for over 30% share every year, while 'UK P&I Club' speak of 40%.

carrier over the goods he carries on board. This stems from the number of parties and legal relationships involved in the process of carriage of goods by sea (*e.g.* carriers, shippers, charterers, sub-charterers, shipowners, operators, NVOCCs, freight forwarders, consignees, agents, sellers and buyers of the cargo), the various documents in which the contract of carriage is contained (bills of lading, sea waybills, voyage or time charter parties), and the multiplicity of legal regimes – the Hague Rules, Hague-Visby Rules, Hamburg Rules as well as national regimes. With regard to the latter problem, the current work will focus on the leading Convention regulating carriage of goods by sea – the Hague-Visby Rules. The presumable successor of the Convention – the Rotterdam Rules, will also be scrutinized in an effort to establish how this particular aspect of the carriage of goods by sea will change should the new regime ever comes in force. Thus, the similarities and differences between the Hague-Visby Rules (HVR) and the Rotterdam Rules (RR) in the area of the carrier's duties over the cargo will be explored, in particular Article III(2) HVR and the relevant articles of Chapter 4 RR. In the maritime world there is a saying that a good knot will hold for years without unravelling. To this effect, the current research will also aim to establish whether the dated Hague-Visby Rules are capable of bridging the gaps between shipping law and commercial practice, or whether modernization of shipping law in the form of the Rotterdam Rules is justified from the perspective of the carrier's cargo-related obligations.

Although the interplay between duties and liabilities cannot be avoided, the scope of the current thesis will not go beyond the content of the contract of carriage, and in particular the obligations of one of the parties, the carrier, while it will set aside other major aspects of the contract of carriage such as conclusion of the contract (*i.e.* the issue of transport documents) or execution of the contract, which is related to liability and limitation of liability.[7] Moreover, the subject matter is further narrowed down by focusing expressly on the cargo-related duties and leaving aside the other fundamental obligation of the carrier, which relates to the vessel, though reference will occasionally be made to the seaworthiness obligation as well, where this is deemed necessary.

The thesis will be organized in five chapters. Firstly, an opening chapter (*Chapter I*) will serve as a theoretical background. It will introduce basic concepts in maritime law, which is intended to help even an unfamiliar reader to grasp the intricacies of those aspects of the carriage of goods by sea that will be dealt with in the subsequent chapters. *Chapter II* presents the legal framework of the carrier's cargo-related obligations and the structural foundation of the thesis. It is shaped as a comparable analysis of the relevant provisions of the Hague-Visby Rules and the Rotterdam Rules, and attempts to establish what sphere of obligations is bestowed upon carriers by the applicable legal regime; what the essence of these obligations is; which party to the contract of carriage is responsible in case of short, damaged or lost cargo as well as at what point this responsibility arises and ceases. Then the focus shifts to particular subtleties seen in actual practice such as

[7] However, see *Chapter II*, section 1. Also, as regards carriage of goods on deck (*Chapter IV*), the discussion will inevitably involve also the subject of the conclusion of the contract, in particular the issue of a clean B/L or a claused B/L. In general, as regards the carrier's obligation over the cargo, it should be noted that in some instances, a clear dividing line could not be made between the contents of the contract of carriage, on the one hand, and the conclusion and execution of the contract, on the other, if one intends to carry out a thorough research.

the incorporation of a FIOS clause[8] in the contract of carriage (*Chapter III*), the carriage of cargo on deck (*Chapter IV*), and the carriage of containerized cargo and the advance of containerization (*Chapter V*). Most of these carriage arrangements represent deviations from the carrier's obligations under the Hague-Visby Rules and as such their interpretation may be accompanied with legal uncertainty.

The larger purpose of the work is to define these particular aspects of the carriage of goods by sea and to analyze through critical thinking the problems which occur in the process of loading, handling, stowing, carrying, and discharging, and which often give rise to costly disputes. The study will be carried out through an analysis of the leading international liability regime as specific attention will be dedicated to English law but other legal systems, both common law and civil law countries, will also be carefully considered. Furthermore, the position taken by the Rotterdam Rules with regard to the problems discussed will also be analyzed. Although it seems that, in present day, the chances of the Rotterdam Rules to be ratified and to come into force are diminishing, the new Convention is of immense value from academic point of view. Its provisions offer a modern solution to all the problems discussed in the thesis and as such, they cannot be omitted.

[8] FIOS stands for Free In and Out Stowed. This clause, when incorporated in a contract of carriage, indicates that loading, stowage of cargo as well as unloading of cargo is free of expense to the shipowner. It is the shipper who bears the associated costs and risks.

Chapter I
General Introduction to Bill of Lading Law

Before embarking on the main question and starting ascertaining the law on the specific problems laid down in the current work, it is essential that we employ consistent terminology. In order to avoid discrepancies and ambiguity, the following remarks and comments should be made concerning the contract of carriage and the parties thereto.[1]

1. Parties to a contract of carriage

It is paramount to outline the main parties that are involved in the carriage of goods by sea. Different parties have different rights and obligations and may be subject to a different liability regime. For example, the Hague-Visby Rules, which will be in the center of attention, have no application to any other parties but to those who are a party to the respective bill of lading contract, either where it was originally generated or where the contract subsequently came into existence by means of the transfer of the bill.[2]

First of all, when referring to a sea carrier, a distinction should be made between:

- a *"common carrier"*[3] is a business or agency which is available to the general public for transportation of people, goods or messages at reasonable rates and without discrimination. That is, a common carrier can render transportation services to any person and company provided that the carrier has been licensed or authorized by the respective regulatory body.[4] This is the first general category of sea carriage, which is known as liner shipping. Liner services operate within strict schedules and have a fixed rotation of ports, where they call at preliminarily published dates. This type of services may include carriage of containers, bulk and break bulk[5] as well as RORO[6] service. Voyages in the liner trade usually provide transportation to many different parties, meaning that there are numerous shippers.

[1] An official definition of these terms is listed in the "Transportation Expression" dictionary provided by the Bureau of Transportation Statistics (BTS) on http://www.bts.gov/dictionary/index.xml

[2] Paul M. Bugden and Simone Lamont-Black – *'Goods in Transit and Freight Forwarding'* (2nd edition), Thomas Reuters (1999), ISBN 978-1-84703-772-5, p. 340.

[3] This is a common law term, and its functional equivalent in civil law is a *'public carrier'*.

[4] For instance, a US common carrier must secure a certificate of public convenience and necessity from the Interstate Commerce Commission (ICC) and the Federal Maritime Commission (FMC) in order to operate and render services.

[5] Bulk cargo is homogeneous cargo – such as grains, ores, oil, and coal – which is loaded and stowed unpackaged in the vessel's holds. Break bulk cargo, on the other hand, represents non-containerized cargo that is packaged and shipped as individual pieces in a unit (may that be boxes, barrels, drums, pallets). Such cargoes often include items that are too big to be carried on a container and they vary from construction equipment to yachts and windmills.

[6] RORO (Roll-on/roll-off) vessels carry wheeled cargo, such as trucks, buses, automobiles and tractors, which are driven on and off the vessel on their own.

- a *"contract carrier"*[7] is a transport line that carries people or goods under a contract of carriage with one shipper or limited number of shippers as the carrier may refuse to transport goods for anyone else. This type of transportation does not serve the general public and is called tramp shipping or tramper. This is the other general category of sea transportation and it is more flexible than liner shipping as it needs not to adhere to a particular schedule. As the tramp service does not offer a fixed itinerary, it can be available on short notice and it can load, generally, any cargo from any port to any other port subject to the agreement between the parties. Tramp services mainly includes transportation on bulk and break bulk carriers. Typical for tramp shipping arrangements is the issuance of a charter party, through which a shipowner and a charterer arrange for the hire of the vessel for a particular journey or a period of time, although a liner ship can also be chartered.[8]
- a *"private carrier"* is a company rendering transport services for its own goods, usually on an irregular or *ad hoc* route. Thus, while common carriers and contract carriers provide transportation service to others, private carriers own the goods which they are transporting. One important feature is that the primary business of private carriers is actually not transportation, and the private carriage is merely intended to support other legitimate businesses of the operator. Private carriage is more common for road transportation and it is less used for water carriage.
- a *"freight forwarder"*[9] is an individual or a company which operates as an intermediary between shippers and carriers in the transportation chain, providing a wide range of important services[10] in order to facilitate the movement of goods. Freight forwarders usually receive small shipments – referred to as less-than-carload (LCL) or less-than-truckload (LTL) – from shippers, after which they consolidate them and contract with a sea carrier for the transportation of the goods. A freight forwarder can, depending on the specific case, act as an agent of the shipper[11], as an agent of the carrier, as an agent of an NVOCC[12], and he may well contract for a carriage of goods as a principal, i.e. the freight forwarder being the contractual carrier vis-à-vis the shipper.[13]

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[7] This type of a carrier is also called a *'private carrier'* in UK English. A stipulation should be made that this common law distinction between contract/private and common/public carriers does not apply in civil law, and it is not known in the Hague-Visby Rules either. That is why the distinction does not play an important role in nowadays international laws regulating modern carriage of goods by sea. The Hague-Visby Rules may apply not only to common carriage, but also to tramp carriage as well, when a bill of lading is issued under a charter party or when the charter party contains a Clause Paramount. See *Chapter II* section 4.4 *infra*.

[8] Thomas J. Schoenbaum – *'Admiralty and Maritime Law'* (5th edition), Thomas Reuters (2011), Volume 1, Chapter 10, p. 777 at § 10-3.

[9] This party is also called a *'forwarding agent'* or *'forwarder'*.

[10] Freight forwarders can, *inter alia*, give advice on exporting costs and charges (freight costs, port charges, insurance costs); prepare and file the relevant documents accompanying the contract of carriage or the contract of sale between a seller and a buyer; arrange the processes of packing, loading and discharging the cargo; book the necessary space on board a sea vessel; ensure that cargo and transport documentation comply with customs regulation.

[11] *Brennan International Transport Ltd and Anr v Blue Q Corporation and Another* – High Court of New Zealand (Asher J) – 18 December 2008 – Lloyd's Maritime Law Newsletter [2009] 761, p. 3.

[12] *Owners of cargo formerly laden on board the "Bunga Mas Tiga" v Confreight Cargo Management Centre (Pty) Ltd* – High Court of South Africa (Durban and Coast Local Division) (Theron J) – 28 September 2001 – Lloyd's Maritime Law Newsletter [2002] 582, p. 4.

[13] *Vastfame Camera Ltd v Birkart Globistics Ltd (The "Hyundai Federal")* – High Court of Hong Kong SAR (Stone J) – 5 October 2005 – Lloyd's Maritime Law Newsletter [2005] 677, p. 4.

- a *"non-vessel operating common carrier" (NVOCC)* performs, in essence, almost the same activities as a freight forwarder as he is also an intermediary, who acts as a freight consolidator for smaller shipments. The NVOCC can, too, issue its own documents of title (*e.g.* a house bill of lading or a sea waybill) and thus he works in the same way as a shipping line but, unlike a freight forwarder, the NVOCC can be liable for loss, damage or shortage of the goods during the sea carriage. The NVOCC appears as a "carrier to shippers" (in the house bill of lading) and as a "shipper to carriers" (in the master's bill of lading). Depending on the facts of the case, an NVOCC may be deemed an agent of the shipper[14] or an agent of the carrier.

As seen above, the terminology differs depending on the specific jurisdiction[15] and also on the facts of the case. For instance, a contractual carrier under a bill of lading contract of carriage may not always be the actual carrier who performs the voyage.[16] That is why, when the term *"carrier"* is employed in the present work, reference will be made, unless explicitly stated otherwise, to the definitions laid down in the international instruments governing the international carriage of goods by sea. Accordingly, Article $I_{(a)}$ of the Hague-Visby Rules provides that:

> *'Carrier' includes the owner or the charterer [of the vessel] who enters into a contract of carriage with a shipper.*

Evidently, the definition envisages not only the shipowner of the vessel but also other parties including a charterer. For comparison, the definition laid down in Article 1.5 of the Rotterdam Rules is even more straightforward:

> *'Carrier' means a person that enters into a contract of carriage with a shipper.*

Next, the *"shipper"* is generally the party that enters into a contract of carriage with the carrier and is named as such in the bill of lading.[17] The shipper may well be a voyage or time charterer of the ship, and in the same time he may be the seller or the buyer of the goods in accordance with the underlying contract of sale. The shipper is the party that prepares the bill of lading and he is obliged to provide accurate information in it. Next, he hands the bill of lading to the master of the ship for signature.

The *"consignee"* is the party who is entitled to delivery that is, the person to whom the cargo is to be delivered under the contract of carriage.[18] The consignee is named as such in the bill of lading, electronic transport record or another transport document, but it is not always the case that a specific name is entered in the consignee box in the bill of lading. Depending on the nature of the underlying sales transaction, the

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[14] *Hartford Fire Insurance Co v Novocargo USA Inc and Others (The "Pacific Senator")* – US District Court (Southern District of New York) (William H. Pauley DJ) – Lloyd's Law Reports [2002] Vol. 1, p. 485; Lloyd's Maritime Law Newsletter [2004] 632, p. 2(2).

[15] For example, carriers in the US are required to treat freight forwarders and NVOCCs as shippers (Ocean Shipping Reform Act 1998, amending Shipping Act of 1984).

[16] For example, German maritime law distinguishes between a contractual carrier and an actual carrier. Whereas the former will enter into a contract of carriage with a shipper, the actual carriage may be carried out through via charterers (disponent owners) or sub-carriers employed by the contractual carrier, who are generally referred to as actual carriers. Under German maritime law, contractual and actual carriers are jointly and severally liable. See: Klaus Ramming – *'German Transport Law and its Effects on Maritime Law'*, 27 International Business Law (July/August 1999), p. 323 at p. 325.

[17] See Article $I_{(8)}$ of the Rotterdam Rules.

[18] See Article $I_{(11)}$ of the Rotterdam Rules.

bill of lading may provide for various possibilities as regards the party that has the right to receive or to control the receipt of the cargo.

First, as stated, the consignee can be explicitly named in the bills of lading and in this case the bill can be physically passed from the shipper to the consignee (*i.e.* the bill is consigned to the consignee). The consignee has no right to further consign or endorse the bill of lading to any other party.[19]

Secondly, the consignee box may contain the words "to order". This allows the shipper to endorse the bill of lading, thus giving orders to whom the cargo is to be delivered. There can be two types of endorsement – it is either an endorsement in blank, which is the signature of the shipper on the back of the bill, thus allowing any person who holds the bill of lading to claim the cargo, or a special endorsement ("endorsement in full"), where the shipper puts his signature on the bill together with the name of the intended recipient of the bill. It is important to note that "to order" bills of lading when in the hands of a party to whom they have not been endorsed, neither in blank nor in full, does not entitle that party to receive the cargo, even when that party is the notify party under the bill of lading.[20] Accordingly, should a carrier release the goods against such bills, he will be liable for misdelivery. The *dictum* of Reyes J in a case before the Hong Kong's Court of Final Appeal clearly states that *"the [bill of lading] contract is to deliver, on production of the bill of lading, to the person entitled under the bill of lading".*[21] That is, a sole presentation of the bill of lading might be insufficient to justify a release of the goods if the party presenting the bill is not entitled to the goods in accordance with the terms and conditions therein.

The third possibility for entitling a party to receive the goods in a bill of lading is a mixture of the first two – *i.e.* the consignee box contains the words "to order" and also the name of a specific consignee. In this scenario, the bill can be physically passed to the named consignee as described in the first example. However, here the words 'to order' allow the consignee to further endorse the bill of lading either by an endorsement in blank or by a special endorsement to a third party. That third party then cannot anymore endorse the bill of lading.[22]

Fourthly, the consignee box may contain the words "bearer" or "holder", or it can be simply left blank. In this case, the holder of the bill of lading is the party entitled to delivery of the cargo. The bill of lading can simply be consigned (that is, physically passed) from one party to another.

The *"cargo owner"* is the party whose interest in the cargo entitles him to sue under the contract of carriage for goods that have been lost or damaged. As the cargo may be sold and resold several times during the contractual voyage, the cargo owner prior to and in the beginning of the voyage may well not be the same party as at the end of the voyage.

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[19] That is why such bills of lading are called a 'straight' bill of lading or a 'non-negotiable' bill of lading.
[20] *Charmax Trading Ltd v WT Sea Air Asia Ltd and Another* – High Court of Hong Kong SAR (Reyes J) – 1 December 2009 – Lloyd's Maritime Law Newsletter [2010] 787, p. 1.
[21] *Charmax Trading Ltd v WT Sea Air Asia Ltd and Another* – High Court of Hong Kong SAR (Reyes J) – 1 December 2009 – Lloyd's Maritime Law Newsletter [2010] 787, p. 1
[22] An exceptional case is when the consignee endorses the bill of lading to a third party by way of a special endorsement which consists of the words 'to order' coupled with the name of the third party. In this particular case the third party, having become the proper owner of the bill of lading, can further endorse it.

Having ascertained the status of the main parties involved in the carriage of goods by sea, it is worth having a look at the essence of the underlying contract. The contract for the international carriage of goods by sea requires the presence of an international element – that is, the transportation should commence in one country and end in another.[23] This process involves implications of a private international law as well as of a public international law character.[24]

2. Types of contracts of carriage

A contract of carriage is a contract for the carriage of goods between two parties – a carrier and a shipper (a consignor or consignee). The definition of a contract of carriage varies depending on the international liability regime in which it is found. For example, the Hague-Visby Rules state that *"[a] 'contract of carriage' applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same".*[25] This definition refers to the document that is issued under a contract of carriage and for this reason the Rules are said to have adopted a documentary approach to contracts of carriage.[26] On the other hand, the Rotterdam Rules provide a definition which describes the obligation of the carrier to carry goods from one place to another, which may include carriage by more than one mode: "*[a] 'contract of carriage' means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage."*[27]

There are two main types of a contract of carriage, which regulate the rights and liabilities of the shipowner, charterer and shipper. Depending on how the ship is employed, the contract may be evidenced by and contained in the bill of lading (abbreviated as B/L), or it may be contained in a charter party. Because of the negotiable character of the bill of lading, third parties' rights and liabilities may also be affected although these parties do not taken part in negotiating and drafting the maritime bill.

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[23] For the definition of '*international carriage*', see Article 1.9 of the Athens Convention Relating to the Carriage of Passengers and their Luggage by Sea, 2002: *"any carriage in which, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or in a single State if, according to the contract of carriage or the scheduled itinerary, there is an intermediate port of call in another State"*

[24] On the one hand, the legal relationship between carriers and their clients (cargo owners, shippers, charterers, freight forwarders) is contained in the contract of carriage and in related legal institutes such as marine insurance and general average; on the other hand, international conventions, treaties and customs on sea carriage of goods delineate the legal framework governing the relationship between the parties.

[25] The Hague-Visby Rules, Article I(b).

[26] Francesco Berlingieri – *'A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules'*, a paper delivered at the General Assembly of the AMD in Marrakesh on November 5-6, 2009, p. 2: http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf

[27] The Rotterdam Rules, Article 1.1.

2.1 Bill of lading contract of carriage

2.1.1 General

The contract contained in and evidenced by the bill of lading (B/L; BOL) is a real contract. This means that, unlike consensual contracts, there should be something more than mere consent between the parties in order to trigger the contract. Thus, when the shipper delivers the cargo to the carrier and the latter accepts it, the contract starts operating. Yet, the contract of carriage is always concluded before the issue of the bill of lading.[28]

It has become increasingly common for shippers to draft their own bills of lading and present them to the carrier for signature. The bills are usually signed by the master of the ship or the carrier's agents. A bill of lading is issued and dated only after the entire cargo covered thereby has been loaded on board the vessel.[29] If a mate's receipt or a tally clerk's receipt has been issued beforehand to the shipper, then the carrier delivers the bill of lading to the shipper in exchange for that receipt. In general, once the bill of lading has been duly signed by the master and thus issued by the carrier to the shipper, the bill is then transferred to the receiver of the goods, either by endorsement or a simple consignment. When the vessel carrying the cargo reaches the port of discharge, the receiver of the goods, who is either a consignee or the shipper himself, must present the bill to the carrier, which will entitle the former to receive the goods stated therein.

2.1.2 Three main functions of the bill of lading

When discussing the bill of lading as an evidence of the contract of carriage, it should be underlined that this shipping document serves and combines three separate and essential functions.

First, it serves as a receipt which evidences that the cargo has been received by the carrier and also provides information about the goods loaded on-board such as their nature, leading marks, number of packages or pieces, quantity, weight, and apparent order and condition.[30] This function is codified in Article III rule 3 and rule 4, which are discussed below in section 4.1 of *Chapter II*. The evidentiary value of a bill of lading, being a receipt, is a very important issue to carriers when they try to escape liability for damaged or lost cargo. For the purpose of the current academic thesis, it is noteworthy to distinguish the evidentiary role of the bill of lading as a receipt as opposed to that of a bill of lading as a contract of carriage. The facts in the bill of lading, as a receipt, may be altered and corrected by extrinsic evidence if, for example, there is a clerical error. This is not the case, however, with the terms of the bill of lading in its role of a contract of

[28] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* – Queen's Bench Division (Devlin J) – Lloyd's Law Reports [1954] Vol. 1, p. 321 at p. 329: *"The use of the word "covered" [in Art. I (b) of the Hague(Visby) Rules] recognizes the fact that the contract of carriage is always concluded before the bill of lading, which evidences its terms, is actually issued. When parties enter into a contract of carriage in the expectation that a bill of lading will be issued to cover it, they enter into it upon those terms which they know or expect the bill of lading to contain."*

[29] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'*, 20th edition, Sweet & Maxwell (1996), ISBN-10: 0421525800.

[30] Historically, the bill of lading originates as a receipt and the earliest bills of lading did not have contractual functions. The other two functions developed throughout the years.

carriage, because it is considered the final written agreement between the parties. This difference is exemplified *infra* in *Chapter IV* on the carriage of goods on deck.[31]

Secondly, the bill of lading represents a document of title to the cargo being shipped. Although there is no universal definition of a document of title, this phrase characterizes the bill of lading as a document being capable of transferring constructive possession over the goods while they are in the temporary physical possession of a bailee (in the case of maritime shipping, the carrier). The transfer of constructive possession takes place upon endorsing or consigning the bill to a third party, which stems from the document's feature to be negotiable, i.e. transferable.[32] After the pivotal case *The "Rafaela S"*[33], even non-negotiable bills of lading, also known as straight bills of lading in the sense that they are not endorsed to third parties but are consigned to a specified person, are considered a document of title, too.

Thirdly, the bill of lading evidences and contains the contract of carriage. The bill of lading is not *the* contract of carriage, as most often bills are issued after the contract has been made, but it is said to be the best evidence of the contract of carriage.[34] When the contract contained in the bill of lading or evidenced thereby is accomplished, the bill becomes a spent bill of lading. It is necessary, however, not solely the bill to be surrendered by the consignee to the carrier for the bill to become a spent bill of lading, but the contract should be fully discharged by both sides and no obligations should be left pending.[35] A typical bill of lading contains a significant number of contractual terms and conditions of carriage, which are traditionally situated on the front of the bill of lading. This first page, containing the Terms and Conditions of the Carrier, is commonly referred to as the "back of the bill of lading". The reverse page of the bill contains particulars such as the name of the shipper, the consignee, and the notify party; the

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[31] Under a clean bill of lading it is not admissible to prove a preceding agreement between a carrier and the cargo interests that the goods may be carried on deck regardless of other evidence. However, a clean bill of lading does not preclude a party from evidencing that there is an accepted custom to carry on-deck in a particular trade. See *Chapter IV*, section 3.

[32] The term 'transferrable', as opposed to 'negotiable', may be considered the technically more correct term. Yet, 'negotiable' has been established as an international term when it comes to bills of lading. This was recognized also in the *travaux préparatoires* of the Rotterdam Rules. See UNCITRAL Document A/CN.9/WG.III/WP.21 – Working Group III (Transport Law), 9th session (New York, 15-26 April 2002) Transport Law – Preliminary draft instrument on the carriage of gods by sea, Annex, para 13: *"The use of the word "negotiable" has been much discussed, and it is undoubtedly true that in some countries the use of the word is not technically correct when applied to a bill of lading. One may consider to use the word "transferable" as being more neutral. The draft instrument uses the expression "negotiable" on the grounds that even if in some legal systems inaccurate, it is well understood internationally (as is evidenced by the use of the word "non-negotiable" in article VI of the Hague Rules), and that a change of nomenclature might encourage a belief that a change of substance was intended."* Under the Rotterdam Rules, however, the problem of negotiability (*i.e.* whether the transferee gets better title over the goods than the transferor) is not addressed and this issue is left to national law. Thus, whereas under English law the transferee of the bill cannot obtain better title over the goods than the title that the transferor had (therefore the term transferable is more appropriate than negotiable), under German law, for example, the term negotiable is not that misleading as the parties can indeed negotiate so that the transferee may receive a better title over the goods than the transferor had. See: Felix Sparka – *'Jurisdiction and Arbitration Clauses in Maritime Transport Documents'*, Hamburg Studies on Maritime Affairs, Vol. 19, p. 47-48.

[33] *J. I. MacWilliam Company Inc v. Mediterranean Shipping Company S.A. (The "Rafaela S")*, Lloyd's Law Reports [2002] Vol. 2, p. 403; Lloyd's Law Reports [2003] Vol. 2, p. 113; Lloyd's Law Reports [2005] Vol. 1, p. 347.

[34] See, for example, *The "Kapitan Petko Voivoda"* [2003] 2 Lloyd's Law Reports 1, where the contract of carriage was contained in and evidenced by six bills of lading but it was also partly evidenced by a fax.

[35] *P&O Nedlloyd B.V. v Arab Metals Co and Others (The "UB Tiger")*, Lloyd's Law Reports [2006] Vol. 1, p. 111.

name of the vessel, the carrier, the master as well as the ports of loading and discharge; description of the cargo, and payable or paid freight.[36] Whereas between a carrier and a shipper the bill of lading itself provides a *prima facie* evidence of the terms of the contract of carriage along with other sources of evidence such as the booking notes and the correspondence between the parties, the bill becomes conclusive evidence of the contract as between the carrier and a *bona fide* endorsee of the bill.[37]

In other words, a bill of lading represents (1) evidence that the goods have been shipped; (2) evidence that its holder has the right to claim possession of the goods and, in certain circumstances, have the property in them; and (3) evidence of the terms and conditions of the contract of carriage.

2.1.3 Essence of the bill of lading

Since the bargaining power between the parties to a bill of lading is unequal, bill of lading contracts are statutorily regulated. The natural result is that freedom of contract is restricted, and this is achieved on a worldwide level through international conventions. The Hague-Visby Rules[38] is the most widespread legal regime as it is in force in most of the world shipping nations. These Rules apply in three instances: firstly, when the bill of lading is issued in a contracting state; secondly, when the carriage is from a port in a contracting state; and, thirdly, when the particular bill of lading contract contains a Clause Paramount, specifying that the contract will be governed by these Rules or by a national legislation implementing them.[39] In the first two instances, the Rules apply mandatorily, namely by force of law whereas in the third instance the Rules apply voluntarily. The division between instances, where the rules apply *ex proprio vigore*, and instances where they are incorporated, is explained by the different effect that will be derived on the operation of the Rules, or on the legislation giving effect to them. Courts often apply the *"contract approach"* towards the Rules when the latter are incorporated and, thus, render them merely equal to contractual provisions.[40] In this case it will be the construction of the contract of carriage on the whole, which will be decisive of whether the incorporated Rules will prevail over the inconsistent contract

[36] However, it should be noted that nowadays many bills of lading forms contain the conditions of carriage on the reverse of the bill of lading, whereas the front page consists of the particulars of the contract.
[37] Felix Sparka – *'Jurisdiction and Arbitration Clauses in Maritime Transport Documents'*, Hamburg Studies on Maritime Affairs, Vol. 19, p. 43.
[38] The International Convention for the Unification of Certain Rules relating to Bills of Lading (the Hague Rules) was signed on 25 August 1924 and subsequently amended by a Protocol signed on 23 February 1968 (the Hague-Visby Rules), and then further amended on 21 December 1979 by the SDR Protocol. All three were signed in Brussels.
[39] The Hague-Visby Rules, Article X.
[40] A good example of the tangible effect of the application of the Rules by force of law, as opposed to their application as contractual terms, is one of the issues that arose in *The "Antares" (Nos. 1 and 2)* [1987] 1 Ll. L. Rep. 424. In this case, the on-deck cargo claim was time barred by Article III rule 6 and the plaintiffs attempted, unsuccessfully, to rely on section 27 of the Arbitration Act 1950, which allows in certain circumstances the extension of a contractually negotiated time-bar period in an arbitration agreement, but *"without prejudice to the provisions of any enactment limiting the time for the commencement of arbitration proceedings"*. This meant that if the Rules had applied merely as a contractual provision, the 1-year time bar would have been considered as a contractual time bar and, hence, it could have been extended following s.27; whereas if the Rules had applied by force of law, the plaintiffs could not have relied on s. 27 because its operation would have been excluded by Article III rule 6. However, the COGSA 1971, as opposed to COGSA 1924, expressly applies the Hague-Visby Rules, giving them the force of law, to every bill of lading, which falls within the three instances laid down in Article X of the Rules. Thus, at least under English law, the Clause Paramount technicality is no longer an issue when it comes to the application of the Rules.

terms.[41] In other words, when the Hague-Visby Rules are incorporated in a bill of lading or in a charter party, they will represent just an additional term of the bill (or the charter party, respectively) that is, the Rules will not operate as statutory provisions and will not have an overriding character in relation to the other terms and clauses in the contract of carriage, which will otherwise be the case if the Rules apply mandatorily by force of law.[42] When it comes to incorporation of the Rules to a bill of lading, however, English law expressly gives them the force of law in all three instances.[43]

2.1.4 Other transport documents

Further characteristics of the bill of lading as a shipping document may be derived by comparing it to other instruments. Depending on the type of trade, the parties to a contract of carriage may issue similar shipping documents, such as receipts, sea waybills, delivery orders, and booking notes, whose functions correspond better to the relevant commercial needs than the bill of lading. Some of the functions of these documents are duplicated, while others differ. In practice, trading parties normally select the document corresponding most to their kind of trade.

The *"mate's receipt"*, as the name suggests, is a mere receipt. As such, it neither evidences the contract, nor is it a document of title. Historically, mate's receipts used to be issued by the chief mate, but nowadays they can be issued by other officers on board the vessel as well. The mate's receipt evidences that the carrier has taken possession of the goods. That is why the information it contains about the cargo is based on a ship's tally or measurement and not on the shipping note that accompanies the goods. The mate's receipt is an interim document as it serves as a basis for the preparation of the bill of lading on behalf of the shipper. When the carrier dates and signs the bill of lading, he requires that the shipper returns the mate's receipt in exchange if such has been issued.

The *"sea waybill"* identifies the person to whom the carrier has to deliver the cargo, and as a result the consignee is not required to produce the waybill to the carrier in order to receive the goods covered thereby. All he has to do in order to obtain delivery of the goods is just present identification. That is why the sea waybill is normally issued for cargo that is not likely to be resold while afloat (*i.e.* the container trade), which suggests that the consignee remains invariable from the beginning until the end of the contractual voyage. The usage of a sea waybill also solves the problems associated with the cargo arriving at the port of discharge before the bills of lading. In this particular scenario the carrier cannot deliver the goods without production of a bill of lading on behalf of the receiving party, and this may cause considerable delays, extra costs and port congestion. Such a problem may occur on short-distance routes like, for example, in the North Sea or the Baltic Sea. The sea waybill solves this problem. It evidences the contract of carriage and operates as a receipt for the cargo loaded, but it is not a

[41] Paul M. Bugden and Simone Lamont-Black – *'Goods in Transit and Freight Forwarding'* (2nd edition), Thomas Reuters (1999), ISBN 978-1-84703-772-5, p. 339.

[42] However, courts generally accept that the paramount clause, if expressly entitled that way, will have precedence over other contractual clauses. For further information on the paramount clause, see: Erling Selvig – *'The Paramount Clause'*, The American Journal of Comparative Law, Vol. 10, No. 3 (Summer 1961), pp. 205-226.

[43] UK COGSA (1971), section 1(6)(a): *"Without prejudice to Article X (c) of the Rules, the Rules shall have the force of law in relation to: (a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract […]".*

document of title and cannot transfer constructive possession in the goods.[44] Therefore, the issue of a sea waybill will not trigger the application of the Hague-Visby Rules, which apply only to *"a bill of lading or any similar document of title"*.[45] In essence, the sea waybill is broadly similar to a straight (non-negotiable) bill of lading, in the sense that it is not transferable, with the exception that the straight bill of lading must be presented by the consignee in exchange for the goods at the port of discharge. Another difference between the sea waybill and the straight bill of lading is that the latter, being a document of title, is a bill of lading within the meaning of the Hague-Visby Rules.[46] Lastly, an important characteristic of the sea waybill is that a shipper may vary the delivery instructions to the carrier at any given moment during the carriage.

The issuing of another shipping instrument, the *"delivery order"*, is necessitated when bulk cargo under a bill of lading has to be sold by the seller, or re-sold by the buyer (who would be the consignee in that bill of lading), to several buyers in different quantities or weight. In this case, the bill of lading covers the bulk cargo as a single consignment, and in order for that consignment to be divided in portions among the new buyers, the underlying contract of sale may provide for the issuance of delivery orders. The delivery order does not assume any of the three characteristics of the bill of lading – it is not a receipt, it does not have contractual and evidential character, and it is not a document of title. Instead, it contains instructions as to the delivery of the cargo.[47] These instructions may generally be of two types: instructions by the seller or consignee to his agents at the discharge port and instructions by the seller/consignee to the carrier. The first type is called *'merchant's delivery order'* while the second type is called *'ship's delivery order'*. Although they are both non-transferable,[48] the latter has functions that are closer in nature to bills of lading, for ship's delivery orders contain the carrier's signature and, thus, his consent to undertake to deliver the respective portion of the cargo to the named holder of the delivery order.[49] By putting his signature on the delivery order, the carrier undertakes to fulfill the delivery order and acknowledges its

[44] UK Carriage of Goods by Sea Act 1992, Section 1(3).

[45] The Hague Rules as amended by The Brussels Protocol 1968, Article I (b). However, most sea waybills contractually incorporate the Rules. Furthermore, note that the Australian COGSA 1991, which embodies the amended Hague-Visby Rules (the Amended Rules) in Schedule 1A, applies to contracts of carriage covered by a sea carriage document (Article 1 Rule 1(b)) as opposed to a bill of lading as it is in the original version of the Rules. Sea carriage documents are further defined as including negotiable and non-negotiable bills of lading, negotiable documents of title that are similar to a bill of lading as well as sea waybills and delivery orders (Article 1 Rule 1(g)). Thus, the amended Hague-Rules will apply with the force of law to carriage covered by a sea waybill, provided that the carriage is governed by Australian law.

[46] *J. I. MacWilliam Company Inc v. Mediterranean Shipping Company S.A. (The "Rafaela S")*, Lloyd's Law Reports [2002] Vol. 2, p. 403; Lloyd's Law Reports [2003] Vol. 2, p. 113; Lloyd's Law Reports [2005] Vol. 1, p. 347. The decision in *The "Rafaela S"* was confirmed in *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* – High Court of Hong Kong Special Administrative Region Court of Appeal (Ma CJ, Barma and Reyes JJ) – 13 July 2007 – Lloyd's Maritime Law Newsletter [2008] 743, p. 3. Although *The "Rafaela S"* is a pivotal case, there have been earlier court decisions that came to the same conclusion that a straight bill of lading, although not negotiable, is still a document of title and should be produced against delivery of cargo. See: *APL Co Pte v Voss (The "Hyundai General")* – Court of Appeal of Singapore (Chao Hick Tin, J.A. and Tan Lee Meng, J.) – 8 October 2002 – Lloyd's Law Reports [2002] Vol. 2, p. 707; Lloyd's Maritime Law Newsletter [2003] 604, p. 2.

[47] Ship's delivery orders are statutorily defined in the UK Carriage of Goods by Sea Act 1992, Section 1(4).

[48] Richard Aikens, Richard Lord, Michael Bools – *'Bills of Lading'*, Informa Law, London 2006, ISBN-13: 978-1843114383, p.17.

[49] UK Carriage of Goods by Sea Act 1992, Section 1(4).

new holder as a consignee, which also makes the delivery order capable of transferring constructive possession to its holder over that part of the cargo that is covered thereby.[50]

2.1.5 Bills of lading under charter parties

In addition, it may often be the case, in fact more often than not, that a bill of lading incorporates some or all of the contractual terms set in a charter party. This is done with the intention to prevent the bill of lading to vitiate or abrogate some or all of the shipowner's right and liabilities that are set in the charter party. Another reason is that charter parties usually contain extended contract provisions, the so-called "rider clauses" and it would be impractical to include all these in the bill of lading. Instead they can be incorporated in the bill. The incorporation, however, must take place expressly through an incorporation clause laid down in the bill of lading so that the bill of lading holder, usually the consignee, is familiar with the terms to which he agrees when buying the negotiable instrument (*i.e.* the bill of lading). If this condition is met, the bill of lading functions as a receipt and a document of title, whereas the actual contract of carriage is contained in the charter party.

In this regard, of considerable importance are the rights of a third party in the particular case when that party becomes a holder, and thus a party to a bill of lading which incorporates a charter party agreement whose clauses may entitle the shipowner, for example, to have a lien over the cargo as a security for the freight and other amounts due to him under the charter party. Unless the bill of lading clearly and unequivocally refers to the relevant lien provision in the charter party, the term is not considered negotiated to this third party and, therefore, the shipowner cannot assert his right to detain the cargo against the bill of lading holder.[51] For a provision to be validly incorporated in the contractual relationship between a carrier and a bill of lading holder, it is decisive whether these two parties intended and agreed to be bound by such a provision found in another document.[52] This discussion is also very relevant to the problems analyzed in *Chapter III* on the FIOS(T) clause.

Besides the lien clause and the FIOS(T) clause, charter party provisions relating to the payment of freight and clauses regarding law and arbitration are also among the most likely candidates to be incorporated in a bill of lading. In the *dictum* of the court in *The "Mariana"* case,[53] a charter party arbitration clause is deemed incorporated in the bill of lading in either one of the two categories of cases. The first category includes cases which meet the following three conditions: the bill of lading specifically refers to the charter party arbitration clause; the arbitration clause makes sense in the context of the bill of lading; the arbitration clause does not conflict with the terms of the bill of lading. The second category of cases are related to bills of lading which incorporate the terms of the charter party generally, while there is no specific reference to the arbitration clause. In these cases, the charter party arbitration clause itself or some other provision should

[50] Simon Baughen – *'Shipping Law'*, 4th edition, Routledge-Cavendish (2009), ISBN-13: 978-0-415-48719-1, p.12

[51] Samuel Williston, Richard A. Lord – *'A treatise on the law of contracts'*, Vol. 22 (4th edition), §58:28

[52] *Thyssen Canada Ltd and Another v Mariana Maritime SA and Others (The "Mariana")* – Canadian Federal Court of Appeal (Décary, Robertson and Sexton JJA) – 22 March 2000 – Lloyd's Maritime Law Newsletter [2000] 537, p. 2.

[53] *Thyssen Canada Ltd and Another v Mariana Maritime SA and Others (The "Mariana")* – Canadian Federal Court of Appeal (Décary, Robertson and Sexton JJA) – 22 March 2000 – Lloyd's Maritime Law Newsletter [2000] 537, p. 2.

make it clear that the arbitration clause found in the charter party is to govern bill of lading disputes as well.

An uncertain situation arises where the vessel is sub-chartered and it is not specified in the bill of lading which of the charter parties along the chain is the one incorporated. The rule of thumb is that the parties intended to incorporate the head charter party rather than a sub-charter party as there is a preference in the authorities to maintain the position that a general reference to a charter party should relate to the charter party contract, to which the shipowner, who issues the bills of lading, is a party.[54]

However, courts do not apply this rule invariably. In the case *The "Vinson"*[55], the vessel's owners Quark entered into an "Eco Pool Vessel Contribution Agreement 1999" and, following the provisions of this agreement, time chartered their vessel to Eco Shipping Ltd. on an Ecotime 99 charter party, which contained a New York Arbitration clause. Eco Shipping Ltd. as owners further sub-chartered the vessel to Sunline Shipping Ltd. on a Baltime charter party, which included a London arbitration clause. Sunline Shipping Ltd. as time charterers contracted to perform a carriage of bananas and several bills of lading were issued by the master of the vessel on a Congenbill form. The front of the bills stated "Freight payable as per Charter-Party dated", and Clause 1 on the back read: "All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause, are herewith incorporated". However, no date for the charter party was stated on any of the bills of lading, and when the bananas arrived in a damaged condition, the receivers brought arbitration proceedings against the shipowners in London, contending that clause 1 of the bills of lading referred to the Baltime charter party, namely the sub-charter. Quark contended that it was the head charter party that was incorporated into the bills of lading and, accordingly, that arbitration should have taken place in New York. Quark's arguments were that the bills of lading were owners' bills and that the shipowners were a party to the Ecotime charter and not to the Baltime charter. Eventually, the court ruled in favour of the receivers, that is, the unspecified charter party incorporated in the bills of lading was the Baltime charter which contained a London arbitration clause. Although the provisions of none of the charter parties were appropriate to be incorporate into the bills of lading, the Baltime charter was considered more closely related to the bills of lading. Decisive considerations for this ruling were a lien provision, which could be incorporated in the bills, and also a clause relating to the responsibility for delay. The court decided that these charter party provisions contributed to the bills of lading contract and, hence, that they made the Baltime charter party more appropriate to be incorporated.

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[54] *Pacific Molasses Co. and United Molasses Trading Co. Ltd. v Entre Rios Compania Naviera S.A. (The "San Nicholas"),* Court of Appeal, Lloyd's Law Reports [1976] Vol. 1, p. 8. See also Sir Thomas Edward Scrutton, Alan Abraham Mocatta (Sir.), Michael J. Mustill (Sir.), Stewart Crauford Boyd, *'Scrutton on Charterparties and bills of lading'*, 18th edition, London: Sweet & Maxwell Limited (1974), p. 63.

[55] *Quark Ltd v Chiquita Unifrutti Japan Ltd and Others (The "Vinson") – Queen's Bench Division* (Commercial Court) (Andrew Smith J) – 26 April 2005 – Lloyd's Maritime Law Newsletter [2005] 677, p. 1.

This more recent approach is also found in *The "Mariana"*[56] and it has adopted the view which was re-stated in *'Scrutton on Charterparties and bills of lading'* (20th edition) that, on examining the facts, the intention of the parties can be to incorporate the sub-charter rather than the head charter.[57]

2.2 Charter party contract of carriage

2.2.1 General

The second type of a contract of carriage is the one contained in a charter party.[58] The term "charter party" is derived from the Latin designation "carta partita" and reflects the old practice of drafting this shipping document.[59] The terms and conditions were written twice on two parts of a single sheet of paper, which was then torn into two duplicate sets – one for each party – and thus the existence of the contract could be evidenced by matching the two copies. Accordingly, the term "charter" signifies that the vessel was leased or granted, whereas the term "party" derived from the parting of the paper.[60]

A charter party is noticeably different to the cargo-related transport documents mentioned above. To begin with, a charter party is, in essence, a contract for the hire of the vessel and it is focused not only on the carriage of the cargo but also on the vessel and the voyage that she takes on. This contract is usually arranged by a shipbroker, who operates on a commission basis and acts in a free market as a mediator between the charterer (who may be a shipper as well) and the shipowner (the actual carrier) of the vessel which will be hired to carry the shipper's cargo. The two parties, the shipowner and the charterer, may be unfamiliar to each other. The process of chartering a vessel is called a *"fixture"* and once the vessel is chartered she is said to be *"fixed"*. In essence, a charter party will be concluded if the entire ship or a significant part of it is to be used for the transportation of the goods during a specified period of time, or for a specified voyage.

The negotiations on a charter party usually circulate around the terms of a standard form of a charter party (*e.g.* Gencon, Graincon, Gentime, NYPE83) as the display of good faith is required from both sides. Although concluding a charter party is usually a swift process, there are three distinct stages during the negotiations. The first stage is referred to by authors as an indication stage, in which parties provide to each other indicative information which does not bind them.[61] The second stage is known as

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[56] *Thyssen Canada Ltd and Another v Mariana Maritime SA and Others (The "Mariana")* – Canadian Federal Court of Appeal (Décary, Robertson and Sexton JJA) – 22 March 2000 – Lloyd's Maritime Law Newsletter [2000] 537, p. 2.

[57] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'*, 20th edition, Sweet & Maxwell (1996), p. 76, Article 38.

[58] Some authors reject the distinction between a bill of lading contract of carriage and a charter party contract of carriage. Instead, sea transportation of goods is believed to be better divided between contracts of carriage (usually covered by a bill of lading or a sea waybill), which relate to cargo, and contracts of hire (covered by a charter party), which relate to a vessel. See: William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), ISBN: 978-2-89635-126-8, p. 16.

[59] Проф. д-р Иван Владимиров – *„Право на международния транспорт"*, София (2008), стр. 85. [Ivan Vladimirov – *'International Transport Law'*, 3rd edition, c/o Jusautor, Sofia (2008), at p. 85]

[60] Samuel Williston, Richard A. Lord – *'A treatise on the law of contracts'*, Vol. 22 (4th edition), §58:5

[61] H. Edwin Anderson, III – *"'Subject to Details" and Charter Party Negotiations'*, Tulane Maritime Law Journal, Vol. 26, No. 1 (Winter 2001), p. 61.

the fixing stage where a *"fixture"* is achieved under the form of a *pro forma* contract. The *"fixture"* represents the meeting of the minds on the main terms of the charter party agreement between the party that is to use the service of the ship and the party that is to supply the ship. These may include, *inter alia*, the type of charter, the parties thereto, the duration of the agreement, the type and characteristics of the cargo that is to be carried, vessel characteristics, rates, etc. After the *"fixture"* has been made, the parties may continue their negotiations into the third stage – the detail stage – where terms that are considered to be of less importance are negotiated such as the speed of the vessel, the fuel use, arbitration and forum selection, and so on.[62]

2.2.2 Essence of the charter party agreement

The charter party contract is a consensual contract, meaning that delivery and acceptance of the cargo are not necessary in order to trigger the contract.[63] The chartering agreement may be based on the charter party document but it may also stem from the general principles of contract law related to the formation of contract. Unlike bill of lading contracts, here it is the attained consent between the charterer and the shipowner on all essential terms which marks the beginning of a charter party contract unless the parties have agreed otherwise.[64] This consent may assume either a formal written form or an oral form as long as there is consideration and manifestation of offer and acceptance on behalf of the parties.[65] Even if the final document is never signed, courts give effect to the intentions of the parties.[66] To sum up, charter parties are formed as soon as the traditional elements of a contract are attained: contracting parties, mutual assent manifested by an offer and acceptance, and consideration. This means that the charter party contract is concluded before any cargo is loaded on the vessel.

A further fundamental distinction between charter party contracts and bills of lading contracts is that the former are not governed by statutory provisions (*e.g.* the Hague-Visby Rules) but are mostly subject to the general rules of contract law.[67] Thus, the charterer and the shipowner, not being limited by statutory provisions, have much more leeway to negotiate the terms and conditions in drafting the contract of carriage. The negotiations between these parties are in general influenced by the rules of supply and demand. There are practitioners, however, who are of the opinion that charter parties, too, should be subjected to mandatory legislation.[68] This is a standpoint, which is motivated by reasons such as the legislative protection of charterers, the need for uniformity between a charter party and a bill of lading, and the lack of logical distinction

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[62] Thomas J. Schoenbaum – *'Admiralty and Maritime Law'* (Fifth Edition), Thomas Reuters (2011), Volume 2, Chapter 11, p. 6 at § 11-2.

[63] Проф. д-р Иван Владимиров – *„Право на международния транспорт"*, София (2008), стр. 87. [Ivan Vladimirov – *'International Transport Law'*, 3rd edition, c/o Jusautor, Sofia (2008), p. 87.]

[64] The parties may agree otherwise in the communication preceding the charter party. Or, they may qualify the moment when a deal has turned into a binding agreement by the incorporation of phrases such as "subject to contract", "subject to details", "subject to approval", *etc.*

[65] Samuel Williston, Richard A. Lord – *'A treatise on the law of contracts'*, Vol. 22 (4th edition), §58:5

[66] *Champion International Corp v The ship "Sabina" and Others* – Federal Court (Trial Division) (Blais J) – 6 November 2002 – Lloyd's Maritime Law Newsletter [2003] 605, p. 2.

[67] Simon Baughen – *'Shipping Law'*, 4th edition, Routledge-Cavendish (2009), ISBN-13: 978-0-415-48719-1, p.9.

[68] Julian Cooke (Barrister, Lincoln's Inn, London) – *'Charter Parties – Is There a Need for Mandatory Legislation'*, reprinted in *'Modern Law of Charterparties'* (edited by Johan Schelin, LL.D.), Jure Forlag AB (2003), Sweden, ISBN: 91-7223-172-6, p. 1.

between charters and bills of lading, considered both a contract of carriage. The first argument can easily be addressed with the fact that tramp shipping is not as tightly organized as liner shipping, and the charterer, who usually contracts to provide cargo for the entire ship or significant part of it, is in a much stronger bargaining position vis-à-vis the shipowner compared to a single shipper vis-à-vis the carrier. The second goal, namely the pursue of uniform rules for both tramp shipping and liner shipping is nowadays unfeasible since even bill of lading contracts of carriage lack uniformity as there are three international sets of mandatory legislation that currently apply to them: the Hague Rules, the Hague-Visby Rules, and the Hamburg Rules. With regard to the third point raised, this introductory chapter of the thesis has brought forward fairly numerous features of the charterparty agreements which point to the conclusion that the latter are in many aspects distinct from bills of lading, and that it is not practicable to render parties to both types of contracts of carriage subject to the same level of legislative protection. Finally, it is not a coincidence that neither the international liability regimes that are currently in force, nor the Rotterdam Rules include charter parties in their scope of operation. Therefore, some of the problems addressed below in this study will generally not apply to charter parties unless similar issues arise in the context of a charterparty agreement (*e.g.* through a clause paramount).

As stated above, charter parties are not subject to statutory provisions such as, for example, the Hague-Visby Rules or the Hamburg Rules. Article I(b) of the Hague-Visby Rules expressly states that the Convention applies only to contracts of carriage covered by a bill of lading or any similar document of title. Similarly, the Rotterdam Rules in Article 6 exclude from its scope charter parties and other contracts for the use of a ship or of any space thereof. For this reason, international liability regimes are, generally, not applicable with regard to the relations between a shipowner and a charterer. Instead, charter parties are subject to the rules of contract law and, therefore, parties have better chance to negotiate the terms that would satisfy best their commercial needs. The rationale behind not exercising legislative control over charter parties lies in the far stronger bargaining position of the charterer vis-à-vis the shipowner as opposed to the position of the shipper vis-à-vis the shipowner. Theoretically, the two parties to a charter party contract may agree on any terms, and in that sense the carrier may contract out all of his duties pertaining to the carriage of goods. This freedom of contract, however, is not unlimited. Courts construe restrictively liability exclusion clauses, even where the literal reading of the terms suggests exclusion of carrier's liability for any cause of loss or any damage (e.g. wording such as "however caused" and "or otherwise howsoever").[69]

Charter parties never serve as receipts, nor do they represent documents of title as their commercial functions are different to those of bills of lading. In the case of a charter party contract, bills of lading will also be issued by the master to the charterer but here they will have no contractual power if the charter keeps the bill of lading and does not negotiate them – this will be the case when the charterers transports their own goods on the chartered vessel and do not procure transport service for third parties.

[69] *Mitsubishi Corporation v Eastwind Transport Ltd and Others (The "Irbenskiy Proliv")* – Queen's Bench Division (Commercial Court) (Ian Glick Q.C., sitting as a Deputy Judge of the High Court) – 15 December 2004 – Lloyd's Law Reports [2005] Vol. 1, p 383.

Therefore, the bills will serve only as a receipt and as a potential document of title over the goods carried. The reason is that the contractual relationship between the shipowner and the charterer is found in and regulated by the charter party. However, bills of lading that are issued under a charter party contract, if in the hands of a third party, will constitute a contract between the carrier (the shipowner or the charterer) and the relevant *bona fide* holder, who is normally either the shipper or the receiver of the goods. The reason is that it is the bill of lading, which regulates the relations between the carrier and the bill's holder.[70] Thus, the underlying negotiable document will become a separate source of rights and obligations, which is independent from the charter party when in the hands of a third party holder.

The underlying commercial purpose of a charterparty is clearly and neatly laid down by Saville, J. in *The "Danah"*:

> *Under a contract of this kind the owners provide the services of their vessel to the charterers in order to enable the latter (either directly or through sub-charters) to engage in the business of carriage of goods by sea. Such a business is very likely indeed to involve making further contracts (usually contained in or evidenced by bills of lading) with third parties wishing to ship goods on the vessel; and such contracts are in turn likely to be made between the shippers and the owners through the agency of the charterers.*[71]

2.2.3 Types of charter parties

Depending on how the vessel will be employed by the charterer, there are two main types of charter parties. These are the voyage charter party and the time charter party.

2.2.3.1 Voyage charter parties

A voyage charter party will be used if the vessel is employed for one single journey. The start and end points of the journey do not necessarily have to be specific ports but they can be specified as regions as well. Thus, for example, in *The "Rio Sun"* the vessel was voyage chartered *"from one safe port Egyptian Red Sea to a choice of discharging ports which included the European Mediterranean not east of, but including Greece, and the continent of Europe (Gibraltar-Hamburg range) [excluding the UK], and also Scandinavia and parts of the Far East".*[72]

The most widespread voyage charter party is the Gencon, which is a BIMCO form[73], whereas for particular trades there are specialized voyage charter forms such as the Polcovoy, Intertankvoy and the Abstankvoy. In principle, the voyage charterer is under the obligation to pay *"freight"* to the shipowner. This charge represents the price that has to be paid in order for certain amount of cargo to be carried on the vessel from one point to another. The freight rate generally depends on the size of the cargo, its

[70] See: The Hague-Visby Rules, Article I (b).
[71] *Kuwait Maritime Transport Co v Rickmers Linie K.G. (The "Danah")* – [1993] 1 Lloyd's Law Reports 351 at p. 353.
[72] *Gatoil International Inc. v. Tradax Petroleum Ltd. Same v. Panatlantic Carriers Corporation (The "Rio Sun")* – Queen's Bench Division (Bingham J) – Lloyd's Law Reports [1985] Vol. 1, p. 350 at p. 353.
[73] BIMCO is the largest international shipping organization that represents shipowners and is also the principal shipping organization responsible for the development of standard contract forms and clauses in the shipping industry.

weight and form as well as on the distance between the port of shipment and the port of destination. The freight, however, may as well represent a lump sum, which is a fixed rate regardless of how much cargo is loaded on the vessel. The charterer will also have to load and unload the cargo within a specified limited period of time, which is called *"laytime"*.[74] If this period of time is exceeded, the charterer will have to pay to the shipowner liquidated damages called *"demurrage"*. On the other hand, if the charterer manages to load the cargo before the provided laytime has expired, then he is awarded despatch (dispatch) money, which is a sum paid by the shipowner. In practice, the despatch money usually amounts to half of the demurrage rate.[75]

A problem may arise in determining the existence and amount of the demurrage, or of the despatch money, respectively, when the notice of readiness (NOR), which is usually required in a voyage charter party so as to trigger the start of the laytime, has turned out to be invalid when given at the port of discharge. The difficulty in this scenario lies in the uncertainty regarding when the relevant period – namely, the laytime giving rise to the owner's rights to demurrage and to the charterer's rights to dispatch money – should start counting. The authoritative decisions in the cases *The "Mexico 1"*[76] and *The "Agamemnon"*[77] support the view that when a NOR is required for the commencement of laytime, and when that notice was tendered in a manner which made it invalid, then it is not admissible that the notice be subsequently rendered effective or that there be a requirement for the notice to be waived once the vessel has started discharging. In *The "Happy Day"*[78] Langley J explored the issue deeper and ruled that laytime shall commence on the first occasion on which it should have commenced had a valid notice of readiness has been tendered in accordance with the charter party.

2.2.3.2 Time charter parties

If a ship is chartered for a particular period of time, regardless of the number of voyages she embarks on, then a time charter party will be used. This is the second main type of a charter party, where a shipowner still operates his vessel but he receives instructions by the charterer. In literature, this is described as a situation where the shipowner retains the navigational control over the vessel, while the charterer acquires the commercial control over her.

Chronologically, time charters were invented later than voyage charters and, although the majority of views uphold that they are contracts of carriage by sea, there are contentions that time charter parties rather represent a contract for the hire of the vessel, for once the ship is time chartered, the charterer is under no obligation whatsoever to perform a sea voyage but he may simply anchor her, however

[74] This term should not be mistaken with *"laycan"*, which is derived from Laydays and Cancelling and which signifies the number of days within which loading should start. This means that during that period the voyage charterer must have prepared the cargo ready for loading, whereas the vessel must be ready to accept it. In case the vessel arrives before the beginning of the laycan period, the charterer does not have to start loading; whereas if the ship arrives after the expiration of the laycan, the contract can be cancelled.
[75] Charlotte Lacey – *'Berth or Port Charterparty?'*, The Swedish Club Letter 2-2002, p. 12-13.
[76] *Transgrain Shipping B.V. v Global Transporte Oceanico S.A. (The "Mexico 1")*, Lloyd's Law Reports [1990] Vol. 1, p. 507.
[77] *TA Shipping Ltd v Comet Shipping Ltd, (The "Agamemnon")* Lloyd's Law Reports [1998] Vol. 1, p. 675.
[78] *Glencore Grain Ltd v Flacker Shipping Ltd (The "Happy Day")*, Lloyd's Law Reports [2001] Vol. 1, p. 754.

commercially unsound this may be.[79] Nevertheless, it is noteworthy that the charge that a time charterer will have to pay to the shipowner for using his ship is called *"hire"*, which may be a daily, weekly or monthly rental of the vessel. Instead of a demurrage clause, time charter parties usually contain an *"off-hire"* clause which does not provide for liquidated damages (*demurrage*) or despatch money but instead relieves the charterer from paying hire when the vessel is unable to serve her contractual purpose.[80] Off-hire clauses, either printed or tailor-made, are not liquidated damages because the latter represent damages that are formulated in a clause upon formation of the contract and provide that the injured party will be duly afforded with a specified compensation should a specific breach occur, which in the case of voyage charter parties is late performance on behalf of the charterer. Conversely, when we talk about time charter parties, there is no need for a breach in order for an off-hire clause to be triggered. The sole purpose of this clause is to relieve the charterer from paying hire for a period of time during which the use of the vessel is compromised.

Time charter parties are usually more extensive (for instance, more details will be provided on fuel consumption and speed) and contain more provisions than voyage charters as the former have to account for much more contingencies due to the longer period of the operation of the contract compared to a contract covering a single voyage.

When bills of lading are issued under a time charter party a particular problem may arise with regard to determining the identity of the carrier. In other words, who is the carrier? Who is to be held responsible for damaged or lost cargo? These are questions which may often puzzle shippers or third-party bills of lading holders who want to file a claim. The problem is that in transportation under a time charter party, the carriage obligations are not allocated to either party but are rather shared between the shipowner and the time charterer because, as stated previously, while the owner possesses the navigational control over the vessel, he transfers the commercial control to the charterer. The default position, however, in common law and also in most international conventions and national legal systems is that only one party can be the carrier in a contract of carriage and this is either the shipowner or the charterer of the vessel.[81] The situation is further exacerbated by two facts: first, very often the bill of lading is not clear enough as to the identity of the carrier, and, secondly, the Hague Rules and the Hague-Visby Rules provide for in Article I (a) that a carrier may well be either the shipowner or the charterer, leaving the cargo claimants with no indication which party is to be legally pursued. Resolving this puzzle is of utter importance for the claimants because suing the wrong party will not only result in inevitably increased legal costs but it may also eventually time-bar their claim.[82]

In general, a time charterer may often operate as a carrier since the time charterer will be the party that is to make a contract with a shipper or several shippers. In this case, shippers will have the status of a consignor vis-à-vis the shipowner,

[79] Francis Reynolds QC (Professor of Law Emeritus, University of Oxford) – *'Time Charterparties and Bills of Lading'*, reprinted in *'Legal Issues Relating to Time Charterparties'* (edited by Prof. D. Rhidian Thomas), Informa Law (2008), London, ISBN: 978-184311-745-2, Chapter 9, p. 161.
[80] See *Baltime 1939 clause 11* and *NYPE 1993 clause 17*.
[81] One exception is the Hamburg Rules 1978, which in Article 10 make a distinction between the contractual carrier and the actual carrier, which can be jointly and severally liable to third parties.
[82] See *Chapter II section 4.1.6* and *4.1.7* below.

whereas they retain their status as shippers vis-à-vis the charterer.[83] The commercial rationale behind this distinction is that under a time charter it is the charterer, and not the shipowner, the party who enters into an express contractual relationship with the shipper. Thus, the charterer may assume the status of a contracting carrier although the default position is actually that, unless there is evidence to the contrary, it is the shipowner who is the actual carrier and employer of the master, who signs the bills of lading, and of the crew.[84] In other words, the shipowner has been traditionally the party that is responsible for the cargo, as he owns the vessels that plays a central role in fulfilling the carrier's obligations, but with the advent of vessel-chartering and the more complex shipping arrangements, the shipowner has been losing out to the charterer in terms of significance.

However, none of the above should be perceived as a rule of thumb as practice has shown that a conflict may occur as to the identity of the contracting carrier under the bill of lading when goods are carried on a chartered vessel and the shipper or receiver is not a party to the charter. In the cases *The "Flecha"*[85] and *The "Starsin"*[86], the court reached two apparently contrasting decisions with regard to the same printed form of bills of lading, which were issued by the charterer and which contained an identity of carrier

[83] Simon Baughen – *'Shipping Law'* (4th edition), Routledge-Cavendish (2009), ISBN-13: 978-0-415-48719-1, p.10, fn.24.

[84] It should be noted that if a *"demise"* clause or *"identity of carrier"* clause is included in the bill of lading, a time or voyage charterer will be considered an agent either of the shipowner or of the demise charterer as the case may be. This is, actually, the main difference between the two clauses – the identity of carrier clause will shift liability to the shipowner, whereas the demise clause will bound the demise charterer to be liable as a carrier. Thus, the time charterer will not be personally liable for short, damaged or lost cargo, and instead the shipowner (or the demise charterer) will be bound by this clause as a contractual carrier. One issue is that these two clauses are lurking on the back of the bill of lading, and they would normally not create much confusion if they merely confirmed what is mentioned on the face of the bill. The problem with the identity of carrier arises when the respective clauses contradict what it is stated in the signature box on the front side of the bill of lading.

The demise clause was drafted by Sir William McNair at the beginning of World War II in order to meet the necessities of the war when merchant fleet was controlled by the government, who chartered the vessels. However, nowadays the validity of the demise clause and the identity of carrier clause is highly disputed and is not operative in many jurisdictions, especially in Continental Europe as these clauses deprive shippers and consignees of their right of suit against the (voyage/time) charterer of the vessel. Both clauses have become anachronistic and are deemed unnecessary, with the exception that they are still held valid by English courts (see, for example, *The "Flecha"* below). These clauses have the effect of rendering the voyage or time charterer not a party to the contract of carriage. This means that although his name is on the head of the bill of lading, and although he issues the bills, collects the freight, and performs the duties of a carrier, he is not actually considered a carrier. Instead, the claimant may sue the party that is designated as a carrier in the clause, which is usually the owner of the vessel or the demise charterer. That is why in some jurisdictions these clauses are considered a derogation from the Hague-Visby Rules – they are deemed not merely to identify the carrier but also to shift the liability for damaged or lost cargo from the time charterer (who actually enters into a contract with a shipper) to the shipowner or demise charterer. To that regard, Article III rule 8 of the Hague-Visby Rules expressly forbids such clauses that lessen the liability of the carrier, who is in this case a (time/voyage) charterer, *"otherwise than as provided in the Rules"*. For more on the demise clause and the identity-of-carrier clause, see: William Tetley, Q.C., *'The Demise of the Demise Clause'*, McGill Law Journal/Revue de Droit de McGill (1999), Vol. 44, p. 807; Caslav Pejovic – *'The Identity of Carrier Problem under Time Charters'*, Journal of Maritime Law and Commerce. Vol. 31, No. 3 (July 2000), p. 379; David F.H. Marler – *'The Treatment, by the Federal Court of Canada, of Demise and Equivalent Identity of Carrier Clauses in Liner Bills of Lading'*, Tulane Maritime Law Journal, Vol. 26, Summer 2002, p. 597.

[85] *Fetim B.V. and Others v Oceanspeed Shipping Co (The "Flecha")* – Queen's Bench Division (Admiralty Court) (Moore-Bick J) – 15 September 1997 – Lloyd's Law Reports [1999] Vol. 1, p. 612.

[86] *Homburg Houtimport B.V. v. Agrosin Private Ltd. and Others (The "Starsin")* – Queen's Bench Division (Commercial Court) (Colman J) – Lloyd's Law Reports [2000] Vol. 1, p. 85.

clause. In the first case, the bills of lading were held to be owner's bills of lading, meaning that it was the shipowner who was considered a contractual carrier, whereas the second case reversed the decision reached in *The "Flecha"* and the bills were held to be charterer's bills, meaning that the charterer was held liable as a contractual carrier.[87] Thus, it is evident that case law is conflicting and does not offer a clear solution how to identify the defendant as the actual carrier. As Colman J points out in *The "Starsin"*, identifying the party that is to carry out the obligation of a carrier will be a matter of construction of the particular bill of lading as well as a question of assessment of the level of understanding of a reasonable person with regard to the clauses therein.[88] To that regard, authors point to several factors to be taken into consideration when determining who the actual carrier is: the signature on the bill of lading, the heading on the face of the bill, the name of the vessel, and, finally, the presence or absence of an identity of carrier clause.[89] In *The "Starsin"* case, in particular, the front of the bill of lading was unequivocal that the contract of carriage was concluded with the time charterer, whereas the reverse contained a demise clause and an identity of carrier clause, which indicated that it was the owner who was the carrier. Because the indications on the face were so clear, the court preferred to ignore what was written on the back of the bill. It was decided that the signature on the bill should be given greater significance for the sake of commercial certainty and business common sense.

2.2.3.3 Other types of charter parties

For the sake of accuracy and comprehensiveness, it should be noted that besides the aforementioned two main forms of charter parties, there are others as well. The reason for having numerous types of charter parties is vested in the freedom which the parties have in negotiating and drafting their contract so that it fits their commercial needs.[90]

One hybrid form of a charter party is the *"trip"* charter, which is, in essence, a voyage charter that adapts some of the elements of the time charter. In particular, the trip charter covers a specific voyage, but instead of paying freight, the charterer pays hire for using the vessel for the time that it takes to transport the cargo from port of shipment to port of destination. This contractual form can be varied in cases when the port of discharge is a remote area and the carrier cannot ensure that he could contract for the carriage of other cargo on the way back. Therefore, the charterer may have to pay further hire until the vessel comes back to a certain trade area.[91]

The *"slot"* charter party is employed when cargo is to be carried on a container vessel. This type of a charter party represents an agreement between the vessel owner and a slot charterer. Slot chartering may be part of a vessel-sharing agreement – this is often referred to as an "alliance" or "consortium" between two or more carriers (either

[87] These cases also show that the analysis applied to identify the carrier is first and foremost involved with determining the party which issued the bill of lading to the cargo interests.
[88] *Homburg Houtimport B.V. v. Agrosin Private Ltd. and Others (The "Starsin")* – Queen's Bench Division (Commercial Court) (Colman J) – Lloyd's Law Reports [2000] Vol. 1 at pp. 85-87 and p. 90: *"The essential question is, however, in what sense could the shipper to whom the bill was originally issued be expected to have understood the words used."*
[89] Caslav Pejovic – *'The Identity of Carrier Problem under Time Charters'*, Journal of Maritime Law and Commerce, Vol 31, No. 3 (July 2000), p. 379 at p.394.
[90] John F. Wilson – *'Carriage of Goods by Sea'*, 7th edition, Longman (2010), ISBN-13: 9781408218938.
[91] John F. Wilson – *'Carriage of Goods by Sea'*, 7th edition, Longman (2010), ISBN-13: 9781408218938.

shipowners, time charterers or bareboat charterers), who reserve a specific number of containers, or slots, on each other's vessels, thus extending their regular service and reducing operating costs by pooling their capacity. Thereby, the slot charterer leases one or several slots on board of a container ship in accordance with the number of containers that he has to transport, as one slot accommodates a 20-foot container. However, some slot charter parties, such as the BIMCO's SLOTHIRE Charter,[92] provide that it is the weight allocation but not the number of slots which determines the ultimate limits of the containers loaded aboard. Accordingly, if the stipulated total weight has been reached and there are still slots available, these latter slots will remain unused, although paid by the charterer. Nowadays, slot charters are very often used in the container trade and this is so because this chartering arrangement utilizes space on a container vessel more efficiently, which cuts operating costs. In the container trade, when container line operators enter into a reciprocal slot charter party, this contract is known as the *"cross-slot"* charterparty.

The charter parties mentioned so far represent the so called carriage charters, and this means that the shipowner and the charterer contract for the use of the carrying capacity of the vessel, and yet she is still manned and navigated by the crew of the shipowner. However, the two parties may also contract for a *"demise"* charter for a certain period of time or for a particular voyage.[93] This is technically not a contract of carriage but a lease of the ship *per se*, whereby the shipowner transfers to the charterer not only the carrying capacity of the vessel but also a possessory interest in her as well as a certain degree of control over her management and navigation.[94] With the shipowner having surrendered the possession and control of the vessel to the charterer, the latter becomes a *pro hac vice* owner of the vessel during the operation of the demise charter party, meaning that now he is vested with the responsibility to man and maintain the vessel. Thus, the pre-existing master and crew of the vessel are now considered employees of the demise charterer and as such they follow his orders. The vessel, however, may also be chartered without a master and crew and this type of demise charter is known as a *"bareboat"* or *"net"* charter.

When a charterer, regardless of the type of a charter party employed, sub-charters the vessel to a third party, the charterer is referred to as a disponent owner vis-à-vis the sub-charterer. This is to be contrasted with the registered owner, known also as a beneficial owner of the vessel, who is the real owner of the ship. Once the vessel is chartered, the charterer obtains commercial control over the ship and can subsequently sub-charter her to other parties. This allows for a long chain of contractual relationships of chartering and then sub-chartering a vessel. These were the circumstances in *The*

[92] See https://www.bimco.org/en/Chartering/Clauses_and_Documents/Documents/Liner/SLOTHIRE/Explanatory_Notes_SLOTHIRE.aspx

[93] It may be noted that in legal literature the demise charter party is often classified as the third main type of a charter party along with the voyage and time charter.

[94] The temporary transfer of "possession, command, and navigation" of the ship from the shipowner to the charterer can indicate whether the charter party is a demise charter party or not. See: Robert Force, *'Admiralty and Maritime Law'*, University of Michigan Library (2004), p. 43. Furthermore, when applying this test, the existing factual context has priority over what is written in the charter party, that is, a charter party may be held to be a demise charter notwithstanding the express "non-demise" clause incorporated therein. See: Samuel Williston, Richard A. Lord, *'A treatise on the law of contracts'*, Vol. 22 (4th edition), §58:6 at p. 26.

"Bremen Max"[95] case, where the vessel was time chartered first to "Cosbulk" on an amended NYPE form[96], after which she was sub-chartered under back-to-back charters[97] to "Farenco", who further sub-chartered her to "Daebo", who in his turn sub-chartered her to "Norden", who then sub-chartered her to "Deiulemar", who had to ship dry cargo from Brazil to Bulgaria. In principle, this chain of chartering and sub-chartering can go even further as long as there is commercial interest in a party to sub-charter the vessel.

Finally, a distinction should be made between a contract of affreightment (COA), on the one hand, and a charter party contract, on the other. Although contracts of affreightment in their essence resemble a voyage charter for a series of voyages, the COA is noticeably different than charter parties. Contracts of affreightment are aimed at the transportation of a fixed quantity of specified cargo by means of several regular voyages. Very often the contract is not limited to one particular vessel, but several ships may be employed to carry out the agreed number of shipments at pre-determined intervals as the freight is to be assessed on the basis of the total quantity of the cargo to be transported. These are, in general, long-term contracts and they are custom-made in order to satisfy the specific needs of the contracting parties. Hence, unlike charter parties, few standard contractual terms can be found in a COA. It is safe to conclude that a COA rather functions as a contractual *"umbrella"* of a series of individual voyage charter parties.

COAs have to be viewed also in the context of the so called volume contracts, a term introduced by the new maritime plus convention the Rotterdam Rules, which have not entered into force yet.[98] Although volume contracts, being a revolutionary concept, have been subject to much debate and controversy, here only their comparison with COAs will be pointed out in line with the subject of this introductory chapter, which is limited to clarifying parties, terms, and notions. According to the definition in Article 1.2, a volume contract is *"a contract of carriage that provides for the carriage of a specified quantity of goods in a series of shipments during an agreed period of time [where] the specification of the quantity may include a minimum, a maximum or a certain range"*.[99] It appears that COAs under the Rotterdam Rules can be considered volume contracts and they can enjoy the same degree of freedom of contract.

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[95] *Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The "Bremen Max")* – Queen's Bench Division (Commercial Court) (Teare J) – Lloyd's Law Reports [2009] Vol. 1, p. 81.

[96] The New York Produce Exchange (NYPE) time charter party was first published by the NYPE in 1913. The document has been revised and modernised several times throughout the years: in 1921, 1946, 1977, and 1993. Today, it is the most commonly used charter party for dry cargo vessels, and parties usually amend or supplement its form through rider clauses so that it fits to their day-to-day commercial needs.

[97] A back-to-back charter party is a contract between the charterer and the sub-charterer, which contains identical terms and conditions to those in the head charter party between the registered owner of the vessel and the charterer. This arrangement is to coordinate the contractual relationships in such a way as to ensure that a charterer can recover from the shipowner any money (*i.e.* despatch money) for which the charterer is liable to the sub-charterer.

[98] About the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea (the Rotterdam Rules), see the brief commentary in *Chapter II*, section 2.3

[99] The Rotterdam Rules, in essence, allow derogation from its provisions (*i.e.* greater or lesser rights, obligations and liabilities) for volume contracts on the condition that: (1) such a contract contains a prominent statement that it derogates from the Rules; (2) the contract is individually negotiated or prominently specifies the contract's sections of derogation; (3) the shipper is given an opportunity and notice thereof to conclude a contract of carriage without any derogations from the Rules; (4) the derogation is neither incorporated by reference from another document nor included in a contract of adhesion that is not subject to negotiation. Such derogation, however, does not apply to: the vessel's seaworthiness (excluding

cargoworthiness though); the shipper's obligation to provide information, instructions and documents; the shipper's obligations with regard to the carriage of dangerous goods; any liability arising from an intentional act or omission or recklessness. See Article 80 of the Rotterdam Rules.

Chapter II

The Carrier's Obligations over the Cargo under the Hague-Visby Rules and the Rotterdam Rules

1. Introduction

Each contract of carriage may be regarded as having three aspects: first, the conclusion of the contract, which is the issuance of transport documents and their effect on the legal relationship between the parties; secondly, the content of the contract, that is, the obligations of the parties to the contract; and thirdly, the execution of the contract, which is related to its performance, liability and limitation of liability.[1] The current academic thesis will focus on the second element of a contract of carriage and, in particular, on the obligations of the carrier over the cargo. The provisions regulating these duties are of fundamental importance to any liability regime governing carriage of goods by sea, because these provisions are inextricably linked to the liability of the carrier. In both international liability regimes, which will be considered closely in this chapter, the obligations of the carrier are defined as positive duties, the breach of which leads to the liability of the carrier.[2] Although the carrier's obligations and the carrier's liability are matters that are closely interrelated, topics such as the liability or the limitation of liability stand outside the scope of the current thesis as the focus of the research will be on the legal framework of the carrier's obligations over the cargo *per se* under a contract of carriage.

Furthermore, although reference will occasionally be made also to the duties of the carrier vis-à-vis the vessel, the focal point will be aimed at the carrier's duties with regard to exercising care for the cargo. Particular attention will be devoted on how these duties are formulated, whether codified or forged by means of the extensive case law; what is their content and nature; how they impact on the evidentiary burden and sequence, namely the burden of proof; and when and under what circumstances carriers can be entitled to exceptions from these cargo-related obligations.[3]

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[1] Philippe Delebecque – *'Obligations of the Carrier'*, published in: *'The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'* / ed. Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, Alphen aan den Rijn : Kluwer Law International (2010), ISBN9789041131485, at p. 71.

[2] The Hamburg Rules, on the other hand, adopted a different model, upon which the carrier's obligations are implied under the general provision on liability.

[3] The terms *"obligations"* and *"duties"* are used interchangeably hereafter.

However, it should be noted that, where the Rotterdam Rules actively promote the expression "obligations of the carrier"[4] and draw a clearer line between obligations and liability, the Hague-Visby Rules do not consider the dichotomy between the two concepts so vividly and, hence, the issue of liability cannot be excluded altogether from the current analysis. Equally important is that under both the Hague-Visby Rules and the Rotterdam Rules, the obligations (Article III (1) and (2) under the HVR and Chapter 4 under RR, respectively) and the respective liability (Article IV under the HVR and Chapter 5 under RR, respectively) are interrelated and cannot operate separately.[5]

2. The evolving law of the carriage of goods by sea

Today's shipping law, and in particular the carrier's obligations and liability, have been influenced by two major factors. The first one is the major alteration of the economic and technical state of seafaring, and it took place in mid-19th century. This, in its turn, triggered the other factor – the international development of laws regulating the shipment of goods by means of merchant vessels.[6] In the past ships were considerably smaller and with limited cargo space, which allowed less goods to be transported in a single voyage. On the other hand, there was much more proximity between cargo owners and shipowners, which facilitated the control over the cargo-related operations. However, when the technical and engineering progress in the late 19th and early 20th century made it possible for bigger vessels equipped with steam engines and steel hulls, then the amount of cargo carried in the holds increased while the close proximity between the two parties started to slightly fade away, also because of the increasing number of other parties involved in the process of sea carriage (*e.g.* agents, intermediaries, banks, insurers).[7]

Furthermore, immediately after the end of World War I, there was a tremendous increase in international trade and most of it was carried by sea. The hostilities in international waters ceased in 1918, which was followed by a rapid growth in international commerce, in which the bill of lading started to play an ever more important role.[8]

In the beginning of the 20th century, the international community became aware of the need for an international regime to regulate world sea trade and to strike a balance between the far stronger bargaining positions of carriers and those of shippers. Although the former were less numerous in numbers, they were much better organized than the latter. The legal relationship between carriers and shippers was, thus, far from being just a simple contract between equal contracting parties that were completely free

[4] See the Rotterdam Rules, Chapter 4.
[5] Alexander Von Ziegler – *'The Liability of the Contracting Carrier'*, Texas International Law Journal, Vol. 44, Spring 2009, p. 329 at p.332.
[6] Божидар Христов – *„Отговорност на морския превозвач при контейнерните превози"*, Библиотека „Българска търговско-промишлена палата" (БТТП), София (1977), сигнатура №105, стр. 4-5. [Bozhidar Hristov – *'The Responsibility of the Sea Carrier in Containerized Shipments'*, issued by the Library to the Bulgarian Chamber of Commerce and Industry (BCCI), Sofia (1977), signature №105, pp. 4-5.]
[7] This was when the bill of lading as a shipping document gained more functions and turned from a mere receipt into a document of title and an evidence of the contract of carriage. See: *Chapter I*, section 2.1.2.
[8] W. E. Astle – *'Shipping and the Law'*, Fairplay Publications (1980), at pp. 1-2.

to negotiate but, to the contrary, there was uneven negotiating power. The statutory restriction of the freedom of contract in the relationship between these two parties was thus deemed necessary in order to prevent shipowners from abusing their superior bargaining power. However, it was not an easy task to achieve harmonization and uniformity with regard to both allocation of risks and protection of potentially weaker parties in the process of negotiating the conditions of carriage. This is mostly due to the fact that political consent is required between ship-operating countries and shipping countries.[9] What renders the whole harmonization process even more complicated is that there are two sides to the coin when it comes to balancing the commercial interests of carriers and shippers. On the one hand, the notion of fairness would suggest that carrier interests and cargo interests should be equal but, on the other hand, every increase in the liability of carriers normally results in increased freight rate. At the end of the day, increased shipping freight rates will have an overall negative impact on international trade, because they will affect manufacturers, exporters, importers, consumers and, eventually, the entire society.[10] In other words, equity and efficiency do not always meet.

2.1 The Hague Rules (1924) and Hague-Visby Rules (1968)

In 1924, the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, known as the Brussels Convention or, more commonly, as the Hague Rules, was signed.[11] One important feature of the Convention must be mentioned here as it will be revealed in each subsequent chapter of the current thesis, and it is that the Hague Rules do not provide a complete regulation of the carriage of goods by sea as they regulate only certain aspects of the contract of carriage, and only if a bill of lading is issued. This Convention was subsequently amended by the Visby Protocol in 1968 and the SDR unit Protocol in 1979. These two amendments, which were collectively referred to as the Hague-Visby Rules, introduced some slight changes[12] but the core provisions

[9] The former, normally operating a substantial fleet, uphold carrier interests. These are industrialized and developed nations such as the USA, the UK, the Netherlands, Germany, and Japan. The latter, on the other hand, are in favour of cargo interests due to the fact that their nationals are usually shippers or consignees. Most of these countries are developing countries with emerging economies.

[10] Ralph C. Walker – *'Regulating Ocean Shipping: Powers and Problems of the Federal Maritime Commission'*, 51 Cal. Law. Rev. 986 (1963).

[11] These geographically confusing designations stem from the pre-history of the Hague Rules. In the context of the abovementioned problems in international marine shipping, the International Law Association (founded in 1873 in Brussels and having Headquarters Secretariat in London) convened a conference in September 1921 to rectify the existing problems. The conference, which took place in the Hague and was highly influenced by the English maritime and transport concepts and ideas, eventually passed draft rules that were called *"Hague Rules, 1921, defining the Risks to be assumed by Sea Carriers under a Bill of Lading"*. These were seen as an international solution to the unbalanced positions of carriers and shippers. General adoption of the Rules did not, however, materialize and that led to a Diplomatic Conference held in Brussels in 1922, aimed at passing a convention, based on these Rules, that is internationally adopted. The Conference appointed a Committee, which, in October 1923, carried out slight modifications to the Rules. Thus, with some alterations, the Hague Rules became the basis of the *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading* adopted in Brussels on August 25, 1924. See: Charles Noble Gregory – *'The Thirtieth Conference of the International Law Association'*, The American Journal of International Law, Vol. 16, No. 3 (Jul., 1922), pp. 451-456 and W.E. Astle – *'Shipping and the Law'*, Fairplay Publications (1980), at p. 2.

[12] For example, the limit of carrier's liability was increased under the Visby protocol and the limitation assumed two formats – one per package or unit and the other per kilo of gross weight, whichever is the higher (see: Hague Rules, Art. $IV_{(5)}$ and Hague-Visby Rules, Art. $IV_{(5)(a)}$). Then, the SDR Protocol brought the Rules up to date with the IMF's current unit of account – the special drawing rights (SDR), which replaced

remained the same, that is, imposing minimum liability on carriers, which they cannot evade.

Most of the provisions in the Rules, if not all of them, are a result of international negotiations and compromises, and as such they may lead to inconsistent results when applied if they are not construed properly. In order to understand how specific provisions within the Rules operate and how to interpret them, we should take into consideration that *"[they] must be read as a whole, they must be read in the light of the history behind them, and they must be read as a set of rules devised by international agreement for use in contracts that could be governed by any of several different, sometimes radically different, legal systems."*[13]

Historically, the liability of shipowners used to swing into extremes from almost full responsibility of the carrier to almost full immunity from liability. In the 19th century a shipowner under English law was strictly liable for loss of or damage to the cargo during the voyage unless he could prove that his negligence did not contribute to the loss or damage and also that one of the excepted perils applied to the case.[14] This strict liability prompted carriers to seek escaping liability through negotiating wide exculpatory clauses as judges in England favoured the autonomy of the parties in drafting their contract.[15] Thus, by employing their vastly superior bargaining position, carriers achieved to compel shippers to agree on all kinds of liability exceptions laid down in the bills of lading which the carriers drafted. The outcome was that such practice ultimately led to a situation where carriers were contracting out their liability altogether.[16] While much of the trade was carried out on British vessels and bills of lading often designated English law as applicable, many countries faced the need to issue their own legislation, striving to reach a balance between cargo interests and carriers.[17] However, the need for uniform legislation was obvious as the various regimes differed from one another. As a result, the growing international pressure towards drafting an international regime culminated in the adoption of the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading known as the Hague Rules. The uniformity and simplification of the bills of lading was thought to bring efficiency benefits to the entire business: first, shippers would not have to closely scrutinize all bills of lading in order to ascertain their rights and obligations; secondly, underwriters were afforded the same benefit upon ascertaining the terms of the bills of lading with regard to the insurance of the cargo; thirdly, bankers were also

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the abandoned gold standard and its unit, the Poincaré franc. The SDR are a unit of account which is based on the weighted average value of several major currencies, and which is less susceptible to inflation.

[13] Gaudron, Gummow and Hayne, JJ in *Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Cooperation Berhad (The "Bunga Seroja")*, Lloyd's Law Report [1999] Vol. 1, p. 512 at point 9

[14] See section 3.1 *infra*.

[15] Robert Force – *'Admiralty and Maritime Law'*, University of Michigan Library (2004), p. 53

[16] See, for instance, *In Re: Missouri Steamship Company* (1889) 42 Ch.D 321, 326.

[17] For instance, the Harter Act (1893) in the USA, which is said to have laid the foundations of all international maritime legislation that followed; the Sea-Carriage of Goods Act (1904) in Australia; the Water-Carriage of Goods Act (1910) in Canada, and the Shipping and Seamen Act (1908) in New Zealand. The Harter Act, in particular, was the basis for the 1924 Hague Rules. This Act, essentially, prohibited the exoneration of the carrier's liability for negligence and for errors to exercise due diligence to provide a seaworthy vessel, while on the other hand a limitation of liability was provided in certain instances (*e.g.* errors of navigation, sea perils, acts of God).

assisted in extending credit lines under bills of lading. Thus, uniformity in bills of lading facilitated many areas along the entire shipping chain.

The Rules did not immediately become a leading international regime for carriage of goods by sea. Their success depended, of course, on the leading shipping countries that adhered to it. First, Great Britain and Spain ratified the Rules in 1930 and then, in 1937, France and the USA ratified them as well, followed by Germany in 1939 which incorporated the Hague Rules in their Commercial Code – "Handelsgesetzbuch" (HGB). This means that it took more than 10 years for the Hague Rules' provisions to be invoked worldwide.

The Hague Rules and their amended version, the Hague-Visby Rules, were the first international liability regime and have well proved to be a successful one, judged by the long period of time in which it has been in use and by its widespread adoption which accounts for more than 80 countries[18] that represent more than 90% of global shipping tonnage. It is not a coincidence that the International Group of P&I Clubs[19] has been very supportive of the Hague-Visby Rules and use them as a benchmark for the Clubs' insurance cover. The merits of this liability regime are the fairly equitable allocation of risk between a carrier and a shipper, its widespread adoption throughout the world, and the extensive case law accumulated during all these years of operation, which provides predictability and diminishes disputes and legal costs.

However, there are several reasons why it is time that the Hague-Visby Rules were updated by a new carriage of goods convention. First, nowadays there are more sophisticated shipping arrangements and modernized practices, which were not addressed by the Rules since these practices (*e.g.* containerization) simply did not exist when the Convention was drafted. Secondly, the tackle-to-tackle scope of the Hague-Visby Rules – though it can be extended by the parties – leaves out multimodal transport. This is an issue that is already addressed by the Hamburg Rules, having a port-to-port scope, and by the Rotterdam Rules, which cover carriage from door to door, but which have not come into force. Thirdly, a modern liability regime should regulate electronic bills of lading and electronic records, something that was unthinkable in the beginning of the 20th century.

2.2 The Hamburg Rules (1978)

The Hamburg Rules[20] were devised as an evolutionary rather than a revolutionary instrument, whose aim was to replace the outdated Hague-Visby liability regime. The Hamburg Rules were drafted in 1978 after working groups were appointed by the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL) in order to explore the weaknesses of the Hague-Visby Rules. In 1992 the new liability regime entered into force.

[18] Along with the countries which adopted the Hague Rules, all put together, the total number of states that adhere to the Hague /Hague-Visby Regime exceeds 90.
[19] An association of the 13 principal P&I clubs (non-profit mutual clubs) which insure wide range of third-party liability such as oil pollution, collision, cargo damage, personal injury to passengers and/or crew. These 13 clubs cover 90-92% of the sea-going vessels tonnage.
[20] United Nations Convention on the Carriage of Goods by Sea [1978].

The Hamburg Rules, however, did not succeed in unifying various national regimes, and turned out to be an attempt to replace the Hague-Visby Rules, which eventually failed to accomplish its purpose. Therefore, the Hamburg Rules have little significance in international shipping as the USA, Germany, France, the UK, Japan, China, the Netherlands, the Nordic countries and, generally, most of the leading shipping nations have not ratified and adopted the Convention. Instead, the endorsing states are mostly developing countries and, what is more, a significant number of the members that adhere thereto are landlocked countries. There are only 34 countries that have implemented the Hamburg Rules and their total share in world maritime trade is estimated at about 5%.[21] As a result, the contracting states control just a tiny share not only in the world's commercial fleet but also in international trade, meaning that the regime did not achieve international acceptance. This is explained by the fact that the Hamburg Rules are perceived as a cargo-oriented liability regime[22] whereas big trading countries, as pointed out *supra*, are ship-operating countries. Therefore, these countries are in favour of carriers' interests and are not willing to embrace a liability regime which puts too much burden on the carrier. Likewise, being more cargo-oriented, the Hamburg Rules are opposed by insurance companies and carriers.

To conclude, the Hamburg Rules did not fulfill their function, which is keeping harmonization of national regimes of sea carriage aligned with the evolved shipping and technological realities at the end of the 20th century. As a result, the Rules do not play a significant role in international shipping nowadays and their limited importance is unlikely to change in the future. This is why they will not form part of the analysis in the current thesis, though reference to them will be made occasionally where deemed necessary.

2.3 The Rotterdam Rules (2008)

The Rotterdam Rules[23] are the next attempt of the international community to modernize and harmonize the existing liability regimes, and when they come into force they will become the third Convention regulating sea carriage. The work on the Rotterdam Rules began in 1998 when UNCITRAL invited the Comité Maritime International (CMI) to prepare a preliminary Draft instrument. CMI, which was the first group to work on this project,[24] introduced the Draft on 10 December 2001. On that basis, UNCITRAL's Working Group III on transport law took up the project in 2002. The Convention was finally drafted in 2008, and the General Assembly of the UN adopted it on 11 December 2008.[25] The formal signing ceremony for the opening for signature took place on 23 September 2009 in Rotterdam, the Netherlands, and this is why the

[21] http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html
[22] For example, unlike the Hague-Visby Rules, the Hamburg Rules hold the carrier liable for negligence and errors of navigation or management of the ship on behalf of the master, mariner or carrier's agents (see: the Hamburg Rules, Article 5). Also, the time bar is extended from one to two years (see: the Hamburg Rules, Article 20(1)), lessening significantly the possibility that shippers lose their right of suit because of a time lapse.
[23] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea.
[24] Chester D. Hooper, Book Review of *"The Rotterdam Rules: A Practical Annotation"* and *"A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules"*, Journal of Maritime Law and Commerce, Vol. 41, p.144, fn.2.
[25] The Convention was adopted through a Resolution 63/122 passed by the UN General Assembly.

Convention is referred to as the Rotterdam Rules. There were 16 signatory states to put their signatures under that document in Rotterdam, followed by several others thereafter at the Headquarters of the United Nations in New York.[26] So far, 25 countries have signed the Rotterdam Rules but only three of them have ratified it – Spain, Congo, and Togo.[27] The required number of ratifications is 20, for according to the Convention's provisions it will enter into force one year after the deposit of the twentieth instrument of ratification, acceptance, approval or accession.[28]

In 2010, the European Parliament adopted a resolution on the "strategic goals and recommendations for the EU's maritime transport policy until 2018" (2009/2095(INI)), which invites EU Member States to support and ratify the new Convention:

> *The European Parliament […] calls on Member States speedily to sign, ratify and implement the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the 'Rotterdam Rules', establishing the new maritime liability system; (para 11)*[29]

Regardless of that note, there hasn't been yet an official conclusion on that matter reached by the European Union. It is to be seen in the following years whether and to what extent this non-binding recommendation will be followed.

Although not operational yet, the Rotterdam Rules purport to be capable of replacing the Hague-Visby Rules as a leading legal regime in international sea shipping.[30] The ultimate attempt is to replace not only the Hague and the Hague-Visby Rules but also the Hamburg Rules and, thus, to become a single and uniform international code regulating carriage of goods by sea. Whether this will happen depends not only on any twenty nations ratifying the convention, but also on the accession of the big trading countries. Otherwise, the Rotterdam Rules will share the same unfortunate setbacks as the Hamburg Rules.

Achieving harmonization is considerably more difficult in the 21st century than it was in the beginning of the 20th century, given the expanding volumes of international trade out carried by sea transport, and considering the increased number of independent states involved in shipping and international transport nowadays. Equally important, consensus is also difficult to achieve, which leads to a long and complicated drafting process. This can be partially evidenced by the 96 Articles divided into 18 Chapters that are laid down in the Rotterdam Rules and compared to only ten articles in the Hague-Visby Rules. Since the new convention has extended much beyond the boundaries of the

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[26] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Article 88.

[27] For the status of the ratification process, see: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html

[28] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Article 94.1.

[29] *'Strategic goals and recommendations for the EU's maritime transport policy until 2018'* (2009/2095(INI)), text adopted by the European Parliament on 5 May 2010 (Wednesday) in Brussels. It can be accessed on: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2010-0128+0+DOC+XML+V0//EN. Document: A7-0114/2010.

[30] See: United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, Article 89.

preceding conventions, some authors suggest that the regulation of the contractual relationship between carriers and shippers has grown into an instrument, which has the character of an international maritime and commercial code.[31]

The substantive scope of the Rotterdam Rules is significantly expanded as the Rules extend to door-to-door carriage. The very name of the Convention indicates that it will regulate multimodal transport, and that is why it is not only a maritime instrument but a so-called *"maritime plus"* instrument.[32] This means that it will regulate multimodal transport provided that at least one of the legs in the international carriage of goods is by sea.[33] In other words, the Rules were not designed to be an exclusively multimodal instrument but a maritime instrument that extends to other modes of carriage complementing the sea leg. This was prompted by the needs of the shipping industry as it was noted that 50% of the 60 million containers carried worldwide in the year of 2000 were transported on a multimodal basis.[34]

Historically, the Rotterdam Rules are not the first international instrument intended to regulate the carriage of goods by various modes of transport. In 1980, the United Nations Convention on International Multimodal Transport of Goods was signed in Geneva. However, this Convention has not entered into force and it is highly unlikely that it will ever do, given the time that has passed since its adoption.

3. The obligations of the carrier over the cargo under common law

Prior to addressing the matter of carriers' responsibility for damaged or lost cargo under the Hague-Visby Rules and the Rotterdam Rules, it is necessary to devote attention to common law in order to understand the rationale behind the various cargo-related provisions. Accordingly, common law will be first discussed in short, bearing in mind that various Hague and Hague-Visby principles (for instance, the burden of proof or the obligations of the carrier) flow from the common law position, and also that the common law approach can be used as a means to construe the contract of carriage.[35] Actually, the Rules themselves were to a large extent contrived on the basis of the common law as well as on maritime customs and practices.

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[31] D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'* (2009), Lawtext Publishing limited, Preface, p. v.

[32] In common jargon the Convention is also referred to as a *"wet multimodal transport"* convention, a *"maritime multimodal"* convention, or a *"maritime plus multimodal"* convention. See: Meltem Deniz Güner-Özbek – *'The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea: An Appraisal of the Rotterdam Rules'*, Hamburg Studies on Maritime Affairs, Springer (2011), ISBN: 978-3-642-19649-2, p. 140. Also see: Yvonne Baatz, Charles DeBattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, Michael Tsimplis – *'The Rotterdam Rules: A Practical Annotation'*, Informa Law (2009), pp. 15-16, para. [5-01].

[33] The Rotterdam Rules, Article 1.1: *"The contract* [of carriage] *shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage."*

[34] Working Group III on Transport Law, 11th session (New York, March 24 – April 4, 2003). See: A/CN.9/WG.III/WP.29, para. 25.

[35] *Mitsubishi Corporation v Eastwind Transport Ltd and Others (The "Irbenskiy Proliv")* – Queen's Bench Division (Commercial Court) (Ian Glick Q.C., sitting as a Deputy Judge of the High Court) – 15 December 2004 – Lloyd's Law Reports [2005] Vol. 1, p 383.

3.1 Cargo claims

Firstly, at common law there was only one overriding obligation for the carrier and this was to deliver the cargo in the same condition in which he had received it.[36] This duty later developed and split into the two separate carrier's obligations that are well known nowadays and codified in the relevant maritime liability regimes – the obligation to provide a seaworthy vessel and the obligation to care for the goods (*i.e.* to properly and carefully treat them). Throughout the 19th century, carriers were under a strict liability with regard to those two obligations. It was the Harter Act (1893), which transformed that strict obligation into one of exercising due diligence to provide a seaworthy vessel and another one of taking care for the goods.[37]

Therefore, under common law the carrier has a fundamental duty to take reasonable care of the goods. A common carrier for reward[38] has strict liability for loss or damage to the goods in transit. The Court interprets this liability as being so severe as to make the carrier virtually assume the nature of an insurer of the cargo.[39] Accordingly, the defendant will be held liable even when he may have used all his due care and diligence. Recovery for the damages could be sought merely by proving that the cargo was delivered to the carrier for shipment in good condition and then it reached its destination in bad condition.

The only escape route for the carrier, thus, was to prove, first, that it was not his negligence to cause or contribute to the loss and, second, that the loss was due to one of the following exceptions: (a) an act of God, (b) Queen's enemies, (c) an inherent vice of the goods, (d) a fault on part of the shipper, or (e) a sacrifice of the goods as general average. In other words, relying only on the excepted perils is not enough for the carrier to avoid liability but he must also show due diligence. This view is expressed by Willes J. in *Notara v. Henderson*:

> *The exception in the bill of lading only exempts the shipowner from the absolute liability of a common carrier, and not from the consequences of the want of reasonable skill, diligence, and care.*[40]

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[36] N.J. Margetson – *'Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers'*, (2008) JIML 14, pp. 153-161, at p. 160.

[37] See Harter Act (1893), Sec.191.

[38] Shipowners who are not common carriers are liable only as bailees and their liability stretches to loss caused by negligence. That is, a carrier will not be found liable in case he proves that he exercised due care and diligence. See: Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton, *'Scrutton on Charterparties and Bills of Lading'*, 20th edition, Sweet & Maxwell (1996), ISBN-10: 0421525800, Article 105, pp. 200-201.

[39] *Forward v. Pittard* (1785), K.B.1 Term Report 27.

[40] *Notara v. Henderson* (1872) L.R. 7 Q.B. 225 at pp. 235 and 236. In this case, the plaintiffs shipped beans on board the defendants' vessel from Alexandria to Glasgow as the bills of lading allowed calling at intermediate ports. After the vessel left the port of Liverpool, she collided, without any fault on behalf of the carrier, which constituted an excepted peril under the bills of lading. The vessel had to go back to Liverpool for a repair, where it was discovered that the beans were damaged by sea water ingress. At that point, the plaintiffs requested the wetted cargo to be discharged but the defendant shipowners denied and continued with the carriage of the cargo to its final destination in Glasgow where, however, the beans were already significantly impaired and its value immensely decreased in comparison with the value of the cargo if it had been discharged and dried at Liverpool. Eventually, the court ruled in favour of the shippers. The shipowners had to pay damages as, regardless of the excepted peril, they breached their duty to take *reasonable care* (emphasis added) for the goods entrusted to them.

Carriers' strict liability under common law, however, is lessened by the rule of freedom of contract whereby carriers may contractually limit, and in fact exclude altogether, their liability by expressly allocating the risk in their contract of carriage with the shipper. Consequently, to counteract this hardline approach established by the common law rules, a shipowner or charterer may rely on a contract provision which may limit, or may very well exclude his liability under a charter party contract or a bill of lading contract, even in cases when the party in breach committed a fundamental breach of the contract.[41] Contractual exceptions, *inter alia*, may be: pirates, robbers, thieves, pilferage, barratry, arrest or restraint of princes, strikes, jettison, leakage, ullage, fire, collision, force majeure, accidents, goods forwarded at ship's expense but owner's risk, at shipper's or charterer's risk, exclusion of some or all liability with regard to particular goods, exclusion of liability for goods covered by insurance, exceptions renouncing the shipowner's warranty of seaworthiness and so on.[42]

3.2 Burden of proof

As the late lamented Prof. William Tetley rightly remarks, the traditional distinction between burden of proof and order of proof extends to marine cargo claims as well.[43] The first term defines the duty of a party to adduce evidence for proving or disproving a fact (the evidentiary burden), whereas the second one denotes the sequence of the facts and allegations to be proved or disproved by either party (the evidentiary sequence). For the sake of simplicity, the term "burden of proof"[44] will be used in the current thesis so as to embrace both concepts – the burden of proof as well as its allocation.

The contract of carriage is a contract of bailment for reward. In general, the law governing carriage of goods by sea has its roots in the law of bailment. Accordingly, once the cargo owner establishes loss or damage to the cargo during the contractual period of bailment, the burden of proof shifts to the latter, who has to prove that the damage to or loss of the cargo did not occur as a result of his fault or the fault of his agents, and that one of the excepted perils applies to the case.[45] Where the exception covers the alleged loss or damage, the burden shifts on the cargo owner to show that it was the negligence of the carrier or his agents that contributed to the damage and thus to deprive the bailee (the carrier) of the safe haven provided by the relevant exception.[46]

[41] A fundamental breach is one that goes to the roots of the contract, and it usually occurs when either party breaches a condition. To the contrary, a breach of a warranty or an innominate term, which does not go to the roots of the contract, is not considered a fundamental breach.

[42] It is difficult to outline a comprehensive list of all the various contractual exceptions. For the most frequent ones that appeared before the court, see Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'*, 20th edition, Sweet & Maxwell (1996), ISBN-10: 0421525800, Articles 106 to 119.

[43] William Tetley – *'The Burden and Order of Proof in Marine Cargo Claims'* (2004). Retrieved from: http://www.mcgill.ca/maritimelaw/sites/mcgill.ca.maritimelaw/files/burden.pdf

[44] Note that due to the term's Latin name (*onus probandi*), sometimes it is referred to as onus of proof.

[45] See 3.1 *supra*.

[46] See "*The Xantho"* (1887) 12 App. Cas. 503.

4. The obligations of the carrier over the cargo under the Hague-Visby Rules

4.1 Carriers' responsibilities: general overview

An ocean carrier has two main bundles of obligations – to provide a seaworthy vessel and to care for the goods from the beginning until the end of the voyage. The current thesis will be dedicated to the second of these fundamental obligations, and to the tasks and operations associated with it such as receiving, loading, handling, stowing, carrying, keeping, caring for, discharging and delivering the cargo. Although this bundle of obligations may be codified differently in the different liability regimes, a carrier wil usually have the following duties with regard to the goods carried:

1. First, the carrier has to accept the cargo from the consignor who may be the shipper, charterer or the freight forwarder.
2. Secondly, he has to ship the cargo, which requires him to:
   a) carry out transportation;
   b) proceed with the necessary dispatch following the contracted schedule;
   c) keep the cargo safe, and
   d) execute the orders of the shipper as contracted.
3. Thirdly, the carrier has to deliver the cargo to the entitled receiver – consignee or endorsee under the bill of lading, meaning that:
   a) the cargo should arrive at the contracted destination, which is the port of discharge designated in the bill of lading;
   b) the carrier should give notice of readiness to the notify party, certifying that the cargo has arrived, and
   c) finally, the carrier should discharge the cargo or make it available to be discharged.

As it will be seen below, the Hague-Visby Rules do not follow that three-dimensional structure. This is so because the Rules were not drafted academically to cover exhaustively every aspect of the process of shipping (which the Rotterdam Rules seem to have attempted as observed *infra*), but they intend to provide unified rules that work well in practice. Thus, some of the cargo-related obligations are worded differently, others are implied, while some are omitted. In particular, some of the duties – such as the duty to carry the goods to the contracted destination and the duty to deliver them to the consignee – are fundamental but are not manifested in the Hague-Visby Rules, where they are solely implied. By contrast, the duty to carry the cargo is expressly recognized in the Rotterdam Rules under the definition of a "contract of carriage" in Article 1.1 and also in Article 11; likewise, the duty to deliver the goods to the consignee is laid down in Articles 11 and 13.1 of the Rotterdam Rules. The result is that misdelivery under the Hague-Visby Rules, which do not elaborate on the liability in case

the carrier breaches these fundamental duties, will be regulated by the relevant applicable law, whereas the Rotterdam Rules will apply also to claims for misdelivery.[47]

Having noted these general differences, the focus of the analysis will first shift to the framework of the carrier's responsibilities set forth in Article III of the Hague-Visby Rules, and then it will focus on the obligations over the cargo in particular. The provision consists of eight rules and particular attention will be devoted to Article III rule 2, which is dedicated precisely to the care for the cargo, whereas the rest of the rules will be briefly outlined as their detailed analysis goes beyond the subject matter of the present thesis.

4.1.1 Article III rule 1

> *The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to:*
>
> *(a) Make the ship seaworthy;*
>
> *(b) Properly man, equip and supply the ship;*
>
> *(c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception and preservation.*

Article III rule 1 of the Hague-Visby Rules prescribes the first paramount duty of the carrier, which is to provide a seaworthy vessel. The elements of this duty are illustrated by case law as being twofold:

> *(1) The vessel must be in a suitable condition and suitably manned and equipped to meet the ordinary perils likely to be encountered while performing the services required of it. This aspect of the duty relates to the following matters.*
>
> *(a) The physical condition of the vessel and its equipment;*
>
> *(b) The competence / efficiency of the master and crew.*
>
> *(c) The adequacy of stores and documentation.*
>
> *(2) The vessel must be cargoworthy in the sense that it is in a fit state to receive the specified cargo.*[48]

This statement of Cresswell J as well as the three sub-sections of Article III rule 1 suggest that the term "seaworthiness" has a broad and comprehensive meaning as it embraces not only a ship's physical characteristics and condition but also her proper manning, crewing and equipment as well as her "cargoworthiness". Consequently, she must be able to perform the contractual voyage, fit for the conditions expected along the journey, and adequately equipped to receive, carry and deliver the respective contractual cargo at the specified destination.

Unlike under common law, where the obligation to provide a seaworthy ship amounts to an absolute warranty[49] in the sense that presence or want of due diligence is

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[47] D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Lawtext Publishing Limited (2009), ISSN 1478-8586, Chapter 3, pp. 58-59.

[48] *Papera Traders co. Ltd. and Others v Hyundai Merchant Marine Co. Ltd. and Another (The "Eurasian Dream")* – Queen's Bench Division (Commercial Court) (Cresswell J) – Lloyd's Law Reports [2002] Vol. 1, p. 719 at p. 736, para. 128.

irrelevant for establishing fault on part of the carrier, the position taken by the drafters of the Hague-Visby Rules reduced this duty to exercising due diligence to provide a seaworthy ship before and at the beginning of the voyage. This means that the duty of seaworthiness is modified and restricted in two ways – first, the standard is one of exercising due diligence and, secondly, it shall be applied before and at the beginning of the voyage but not *en route*.

The reason why the obligation of seaworthiness in the Hague-Visby Rules is restricted to the time of embarking on the voyage is clearly explained by the renowned legal authority in the shipping world Sir Norman Hill during the proceedings of the Hague Conference of ILA in 1921:

> *To begin with, before you start loading your cargo you must have a seaworthy ship, a ship worthy to take that cargo, and when she leaves on the voyage she must still be seaworthy. If you go further than that, and you say that there is an absolute obligation on the part of the shipowner to keep the ship seaworthy throughout the voyage, then, of course, you render quite valueless most of your exceptions [in Article IV]. For instance, if, through the negligent navigation of the pilot, the ship is run on the rocks and holed, she ceases to be seaworthy.* [50]

The main argument upholding the temporal limitation of the duty to provide a seaworthy vessel, as laid down by Sir Norman Hill, is that a carrier can no longer influence the condition of the ship once she has set sail.

Thus, in *The "Aconcagua"*[51] a container of dangerous cargo exploded as a result of being stowed close to a bunker tank which was heated up during the voyage so that bunkers could be transferred for fuel oil. The shipper's allegation that the charterer failed to provide a seaworthy vessel was struck down by the court on the grounds that at the commencement of the voyage the vessel was not unseaworthy as the usage of this particular bunker tank, which caused the heating and the subsequent explosion, had been neither necessary, nor pre-programmed to occur, but it was rather a result of operational decision made during the journey. The court accepted that it was the operative fault of the Chief Officer and the Chief Engineer upon taking a decision on which bunkers should be used and disregarding the instruction that the dangerous cargo in the container should be stowed away from sources of heat. Therefore, heating the specific bunker tank was considered negligence but not unseaworthiness.

It is also noteworthy that a carrier is not under a duty to provide a seaworthy vessel when the ship is actually not in his "orbit"; like, for example, when she is being constructed in the shipyard. In *The "Happy Ranger"* it was ruled that the obligation under Article III rule 1 does not attach, unless the vessel is in the ownership, possession or control of the carrier, and this stance is not affected by the standard practice in

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[49] *Kopitoff v. Wilson* (1876) 1 Queen's Bench Division 377, at 380; *Steel v. State Line Steamship Co.* (1877) 3 App. Case at 86 (Blackburn LJ).

[50] Comité Maritime International – *'The Travaux Préparatoires of the Hague and Hague-Visby Rules'*, p.145 at [82].

[51] *Compania Sud Americana De Vapores SA v Sinochem Tianjin Import and Export Corporation (The "Aconcagua")* – Queen's Bench Division (Commercial Court) (Christopher Clarke J) – 24 July 2009 – Lloyd's Law Reports [2010] Vol 1, p. 1.

shipbuilding contracts to allow the master and/or the chief officer to come on board the vessel before completion of construction in order for them to be familiarized with the vessel.[52] Gloster J asserted that *"a shipowner will not, in principle, be liable for any defects in the construction of the vessel because this would involve "an almost unlimited retrogression" in relation to a shipowner's non-delegable duties".*[53]

As pointed out above, the nature of the duty of seaworthiness is limited, too. The obligation is reduced to one of exercising due diligence. Thus the shipowner is relieved from the absolute obligation under common law to provide a seaworthy vessel:

> *Seaworthiness is not an absolute concept; it is relative to the nature of the ship, to the particular voyage and even to the particular stage of the voyage on which the ship is engaged. Seaworthiness must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable.*[54]

The lower standard of seaworthiness can be explained with the fact that, under the Hague-Visby Rules, carriers cannot escape liability by relying on the freedom of contract to negotiate terms reducing or excluding this duty altogether. Accordingly, requiring carriers to conform to an absolute warranty of seaworthiness would place too much burden on them.

Furthermore, the exact standard of seaworthiness cannot be fixed but it varies according to the specific marine adventure and to numerous factors such as the type, age and characteristics of the vessel, the type of cargo that is to be carried on that vessel, the geographic area of the voyage, the season of the year and the expected atmospheric conditions, the knowledge of shipbuilding and navigation that is available in the shipping industry at the time of the voyage, *etc.* The required degree of fitness that a ship must have in order to be considered seaworthy is determined in an earlier case as being the following:

> *The ship must have that degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it. Would a prudent owner have required that it [the defect] should be made good before sending his ship to sea, had he known of it?*
>
> *It would not be enough for him to say, "at the time this ship was built she was seaworthy in the state of knowledge then existing, and I am not going to alter her in view of later discoveries."*

[52] *Parsons Corporation and Others v CV Scheepvaartonderneming Happy Ranger (The "Happy Ranger")* – Queen's Bench Division (Commercial Court) (Gloster J) – Lloyd's Law Reports [2006] Vol. 1, p. 649.
[53] *Parsons Corporation and Others v CV Scheepvaartonderneming Happy Ranger (The "Happy Ranger")* – Queen's Bench Division (Commercial Court) (Gloster J) – Lloyd's Law Reports [2006] Vol. 1, p. 649, at p. 653, para. 19.
[54] *Papera Traders co. Ltd. and Others v Hyundai Merchant Marine Co. Ltd. and Another (The "Eurasian Dream")* – Queen's Bench Division (Commercial Court) (Cresswell J) – Lloyd's Law Reports [2002] Vol. 1, p. 719 at p. 736, para. 126-127.

> *The standard of seaworthiness must rise with the improved knowledge of shipbuilding and navigation.*[55]

In the case *The "Eurasian Dream"*, Cresswell J provided four benchmarks to distinguish between negligence of the master and crew, which is excused under Article IV rule 2(a), and incompetence, which is tantamount to unseaworthiness. Incompetence, in his dictum, is derived from: *"(a) an inherent lack of ability; (b) a lack of adequate training or instruction: e.g. lack of adequate fire-fighting training; (c) a lack of knowledge about a particular vessel and/or its systems (operation of the CO2 fire-fighting system); (d) a disinclination to perform the job properly; […] (e) physical or mental disability or incapacity (e.g. drunkenness, illness)".*[56]

Furthermore, Article III rule 1 on seaworthiness is paired with Article IV rule 1, which confirms that the duty is confined to exercising due diligence only, but here this standard is upheld from the perspective of the carriers' defences – *i.e.* the latter shall not be liable unless seaworthiness is caused by want of due diligence.[57] The rule goes on to specify that the burden of proof shall be on the carrier who invokes the defence under that particular rule. In other words, whenever goods have been lost or damaged, the carrier must prove that he exercised due diligence to make the ship seaworthy. What is more, it is common ground that a carrier must establish that due diligence was exercised not only by him, but also by his independent contractors.[58]

It is important also to point out two other aspects of the duty to provide a seaworthy vessel. First, it is an "overriding" obligation and, thus, a carrier who breached it by providing an unseaworthy ship cannot then avail himself of the defences laid down in Article IV or of contractual exceptions that can meet the requirements of Article III rule 8.[59] The term "overriding" originates from common law and it implies that even when the failure to provide a seaworthy vessel forms only a part of the cause for the damage, the other part being an excepted peril, the breach of that overriding obligation

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[55] A statement of Lord Justice Scrutton in *F. C. Bradley & Sons Ltd. v Federal Steam Navigation Co.* – Court of Appeal (Bankes LJ, Scrutton LJ and Atkin LJ) – 26 March 1926 – Lloyd's Law Reports [1926] Vol. 24, p. 446 at p. 454. This statement was maintained also in: *Eridania S.p.A. and Others v Rudolf A. Oetker and Others (The "Fjord Wind")* – Court of Appeal (Waller LJ, Clarke LJ and Sir Murray Stuart-Smith) – Lloyd's Law Reports [2000] Vol. 2, p. 191 at p. 197.

[56] *Papera Traders co. Ltd. and Others v Hyundai Merchant Marine Co. Ltd. and Another (The "Eurasian Dream")* – Queen's Bench Division (Commercial Court) (Cresswell J) – Lloyd's Law Reports [2002] Vol. 1, p. 719 at p. 737, para. 129.

[57] Article IV rule 1 prescribes: *Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article.*

[58] *Riverstone Meat Co Pty. Ltd. v Lancashire Shipping Co Ltd. (The "Muncaster Castle")*, Lloyd's Law Reports [1961] Vol. 1, p.57.

[59] *Maxine Footwear Co Ltd v. Canadian Government Merchant Marine Ltd (The 'Maurienne')* – (Viscount Kilmuir (Lord High Chancellor), Lord Reid, Lord Tucker, Lord Somervell of Harrow and Lord Denning.) – Lloyd's Law Reports [1959] Vol. 2, p. 105.

will nevertheless be regarded as the only cause, which makes the carrier responsible for the entire damage.[60] In Lord Wright's dictum:

> *"I doubt whether there could be any event which could supersede or override the effectiveness of the unseaworthiness if it was "a" cause."*[61]

With regard to causation, it is interesting pointing out an observation made by Lord Wright, namely that the concept of unseaworthiness manifests differently when applied to two different kinds of maritime agreements – a marine insurance contract and a contract of sea carriage of goods. Under a marine insurance contract, seaworthiness represents a condition precedent, meaning that, if unseaworthiness is present, the insurance cover is void regardless whether unseaworthiness was a cause for the loss or not. Conversely, under a contract of carriage, as observed hereinabove, failure to fulfill the seaworthiness obligation does not affect the carrier's liability as long as unseaworthiness is not a cause for the loss or damage.[62]

Secondly, the obligation to exercise due diligence to provide a seaworthy ship is a non-delegable duty and, hence, the carrier cannot contract it out; accordingly, he will be held liable also for the fault of his agents as well. This was established in the famous case *The "Muncaster Castle"*.[63] This Hague-Rules case that dates back to 1961 gave rise to the so-called *"Muncaster Castle Amendment"*, which was proposed during the negotiations for the Visby protocol. Ultimately it was rejected at the 1968 Diplomatic Conference since it proposed an amendment of Article 3 rule 1 of the Hague-Rules that would allow carriers to subcontract their obligation to exercise due diligence to make the vessel seaworthy to an independent contractor, which was considered to be a retrogressive step.[64]

4.1.2 Article III rule 2

Article III rule 2 contains the second bundle of duties placed on the carrier, which are related to the proper and careful care for the cargo throughout the contractual journey. As such, this article will be particularly addressed in detail below in section 4.3, and special attention will be devoted to the nature of these duties, the moment when they arise and cease, and the possibility of delegating them to third parties.

4.1.3 Article III rule 3

> *After receiving the goods into his charge the carrier or the master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things:*

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[60] *Smith, Hogg & Co., Ltd. v. Black Sea & Baltic General Insurance Company, Ltd.* (*The "Librum"*) – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – Lloyd's Law Reports [1940] Vol. 67, p. 253.

[61] *Smith, Hogg & Co., Ltd. v. Black Sea & Baltic General Insurance Company, Ltd.* (*The "Librum")* – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – Lloyd's Law Reports [1940] Vol. 67, p. 253, citation at p. 260.

[62] *Smith, Hogg & Co., Ltd. v. Black Sea & Baltic General Insurance Company, Ltd.* (*The "Librum")* – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – Lloyd's Law Reports [1940] Vol. 67, p. 253, at p. 258.

[63] *Riverstone Meat Co Pty. Ltd. v Lancashire Shipping Co Ltd. (The "Muncaster Castle")*, Lloyd's Law Reports [1961] Vol. 1, p.57.

[64] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), Vol.1, ISBN: 978-2-89635-126-8, p. 11.

> *(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.*
>
> *(b) Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper.*
>
> *(c) The apparent order and condition of the goods.*
>
> *Provided that no carrier, master or agent of the carrier shall be bound to state or show in the bill of lading any marks, number, quantity or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.*

Article III rule 3 contains one of the most important duties of the carrier under the Hague-Visby Rules. It obliges the master or the carrier's agent to issue, *"on demand of the shipper"*, a bill of lading that certifies the cargo's leading marks, the quantity or weight of the goods, and their apparent order and condition. While representations regarding the first two of these cargo characteristics can hardly be ambiguous,[65] the third one – the apparent order and condition of the cargo – is not always sufficiently clear as the master or his agent usually states in the bill of lading only what is directly observable. Thus, when, for instance, a packed cargo is flawed but its packages seem to be unimpaired, then a reasonable master is likely to state in the bill of lading *"received in apparent good order and condition"*, being able to see only the cargo's external appearance, unaware of the true state of the goods inside the package. In such a case and especially with regard to containerized cargo, the statements of the carrier will refer only to the condition of the container and not to the goods inside.[66]

4.1.4 Article III rule 4

> *Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a), (b) and (c). However, proof to the contrary shall not be admissible when the bill of lading has been transferred to a third party acting in good faith.*

A bill of lading, which shows the representations made by the carrier in accordance with rule 3, is rendered by force of Article III rule 4 a *prima facie* evidence of receipt of the cargo by the carrier as it is described therein. It follows that a carrier is *prima facie* liable for all loss or damage to goods that were delivered to him in good order, as evidenced by the bill of lading, and that out-turned lost, short or in bad order when they were received by the consignee at the end of the voyage. That is why in

[65] Whereas sub-sections (a) and (b) require information as furnished by the shipper, in the third instance the carrier shall take steps to ascertain the apparent order and condition of the goods. Equally important, the proviso at the end of the rule suggests that, with regard to sub-sections (a) and (b), the carrier is not bound to sign a bill of lading if he has reasonable grounds to suspect that the figures are not accurate or if he is unable to check them.

[66] Felix Sparka – *'Jurisdiction and Arbitration Clauses in Maritime Transport Documents'*, Hamburg Studies on Maritime Affairs, Vol. 19, p. 42.

practice carriers endeavour to put as few details as possible in the bill of lading so that they keep themselves less exposed to risks of future litigation.[67] One should also keep in mind that rule 4 is only operable in relation to Article III rule 3 and will, therefore, not be triggered if the description of the cargo is said to be made by the shipper or if the carrier clauses the bill.[68] What is more, where the apparent condition of the goods cannot be ascertained by the carrier by performing a reasonable and practical examination upon loading, a clean bill of lading may be insufficient to establish a *prima facie* case.[69]

Also, it should be noted that the presumption created by rule 4 of Article III is a rebuttable one, namely, a clean bill of lading constitutes only a refutable proof of absence of physical damage to the cargo. In *The "Eagle Strength" and "Hyundai Pioneer"*[70] a clean bill of lading was issued at the port of loading regarding the carriage of a container stuffed with rolls of mattress fabric. After several sea journeys and a subsequent rail carriage, the cargo was found damaged by seawater. The court pointed out that the clean bill of lading meant only that the cargo was accepted in *apparent* good condition and that the bill was only a proof of visible and actual damage, noting also that it was impossible for the shipowners to establish the true condition of the goods carried. In the court's opinion, the claimant cargo owners failed to provide evidence proving that the goods were damaged while in the custody of the carrier and, thus, they failed to discharge the burden of proof. That is, no matter that the cargo was undoubtedly wetted at some point by an unknown source, the cargo owners did not succeed to hold the shipowners liable for the damage. On the facts of the case, a sole clean bill of lading was not considered sufficient evidence given that: the rolls were received at the port of discharge without any exceptions, showing that the actual condition of the rolls was impossible to be ascertained; the exterior packaging of the rolls was proven by the shipowners to be intact; there were no other claims or notations by shippers regarding damage of goods carried alongside the cargo of rolls that was allegedly damaged during the sea voyage. On the other hand, vis-à-vis third party bill of lading holders, the information as stated on the bill becomes a *conclusive* evidence as to the quantity and condition of the cargo.

4.1.5 Article III rule 5

> *The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity and weight, as furnished by him, and the shipper shall indemnify the carrier against all loss, damages and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.*

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[67] Felix Sparka – *'Jurisdiction and Arbitration Clauses in Maritime Transport Documents'*, Hamburg Studies on Maritime Affairs, Vol. 19, p. 42.

[68] Richard Aikens, Richard Lord, Michael Bools – *'Bills of Lading'*, Informa Law, London 2006, ISBN-13: 978-1843114383, p.84 at para. 4.47.

[69] *Elders Grain Company Ltd and Another v The Vessel "Ralph Misener" and Others* – Federal Court of Appeal of Canada (Richard CJ, Décary and Létourneau JJA) – 15 April 2005 – Lloyd's Maritime Law Newsletter [2005] 666, p. 2(1).

[70] *American Risk Management Inc and Anr v APL Co Pte Ltd and Others (The "Eagle Strength" and "Hyundai Pioneer")* – Federal Court (Trial Division) (Lafrenière P) – 30 September 2002 – Lloyd's Maritime Law Newsletter [2003] 605, p. 1(2).

Article III rule 5 provides for obligations that are owed by the shipper to the carrier, namely to guarantee the accuracy of the information (marks, number, quantity and weight), which is furnished to the latter at the time of shipment in order for the bill of lading to be issued, and to indemnify him against all losses that stem from unfulfilling this obligation. Two points must be highlighted with regard to these duties. First, it is presumed that the duties mentioned herein cannot be transferred from the shipper to a third party along with the transfer of the bill of lading.[71] Secondly, the rule explicitly denies any limitation of carrier's responsibilities and liability under the contract of carriage towards other persons, apart from the shipper.

4.1.6 Article III rule 6

> *Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.*
>
> *The notice in writing need not be given if the state of the goods has, at the time of their receipt, been the subject of joint survey or inspection.*
>
> *Subject to paragraph 6bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period, may however, be extended if the parties so agree after the cause of action has arisen.*
>
> *In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.*

Article III rule 6 provides the carrier with a statutory time bar for claims against him. The provision relieves the carrier of any liability if no litigation or arbitration proceedings are brought within one year after the goods were delivered or should have been delivered unless the parties agree otherwise once the cause of action has arisen. Furthermore, rule 6 also creates a refutable presumption that the goods have been delivered by the carrier as described in the bill of lading unless notice of loss or damage has been given in writing to the carrier upon delivery of the goods at the discharge port or, in case the loss or damage is not that apparent, within 3 days after delivery. Lastly, the provision in its final paragraph vests the carrier and the receiver with the duty to facilitate each other in inspecting and tallying the goods in the case of actual or apprehended loss. It is supposed that this duty is owed by the carrier while the cargo is still on board the vessel, whereas it is owed by the receiver once the goods are discharged.[72]

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[71] Sir Guenter H. Treitel Q.C., Francis M.B. Reynolds Q.C. – *'Carver on Bills of Lading'*, 2nd edition, Sweet & Maxwell Ltd (2005), ISBN13: 9780421877009, p.584 at para. 9-152.

[72] Richard Aikens, Richard Lord, Michael Bools – *'Bills of Lading'*, Informa Law, London 2006, ISBN-13: 978-1843114383, p.264 at para. 10.179.

The parties to the contract are not conferred a choice as to which limb of the time-bar provision in rule 6 will come into play upon determining the commencement of the 1-year time limit. In other words, the parties cannot decide arbitrarily whether the reference point should be the date of delivery of the goods, or the day when "they should have been delivered". Conversely, the words "should have been delivered" are held to be applicable only when there had been no delivery of the cargo.[73] Thus, when determining whether there has been a valid delivery, time should start counting when the goods arrive at a legitimate place and, in case they do not do so as a result of, for example, losing the goods overboard or never loading them, time starts counting when they ought to have been delivered assuming the contract has been duly performed. Even in cases where the contract has been varied, it will be accepted that there has been a valid delivery but if, on the other hand, delivery takes place under a separate agreement, then there is no such delivery within the meaning of Article III rule 6.[74]

Besides issues related to the calculation of the 1-year time limit set by rule 6, controversies may also arise with regard to whether the commencement of arbitration or suit falls within this particular time-bar period. This can happen where the communication between the parties is not that unambiguous and that makes it difficult to assess whether the parties' intent was indeed to begin arbitration or court proceedings or not. In *The "Voc Gallant"*[75] two preliminary issues arose: whether a message from the shipowners' solicitors to the charterers constituted a notice to commence arbitration; and whether the 1-year time bar will apply also to a counterclaim raised in defence of the shipowner's claim in the arbitration proceedings. The shipowners in that case claimed outstanding hire from the charterers, and in return the charterers brought a cross claim alleging that the owners breached Article III rule 2 of the Hague Rules. The one year time bar for the charterers cargo claimed expired on 11 November 2006. On 2 November 2006 the shipowners' solicitors sent a message to the charterers reading:

> *In the circumstances, therefore, we are instructed to notify you that failing payment of the US$162.22.60 [sic] within 7 days of today's date we are instructed to commence arbitration against you pursuant to clause 45 of the charterparty.*
>
> *[…]*
>
> *Failing payment, or in the alternative agreement to the appointment of one of the above arbitrators as sole arbitrator, we will appoint our own arbitrator…*

As to the first issue, the High Court ruled that the arbitration panel erred in its finding that this message did not constitute a notice that is sufficient to commence arbitration and that it was rather a mere demand. Judge Mackie QC also rejected the owners' submission that the message constituted no more than a threat. The Court's view was that the message of 2 November 2006 was a notice, through which one party

[73] *Trafigura Beheer BV v Golden Stavraetos Maritime Inc (The "Sonia")* – Queen's Bench Division (Commercial Court) (Morison J) – 12 June 2002 – Lloyd's Maritime Law Newsletter [2002] 590, p.1.
[74] *Trafigura Beheer BV v Golden Stavraetos Maritime Inc. (The "Sonia")* – Court of Appeal (Sir Andrew Morritt V-C, Clarke and Kay LJJ) – 15 May 2003 – Lloyd's Maritime Law Newsletter [2003] 614, p. 1.
[75] *Bulk & Metal Transport (UK) LLP v Voc Bulk Ultra Handymax Pool LLC (The "Voc Gallant")* – Queens Bench Division (Commercial Court) (His Honour Judge Mackie QC, sitting as a Judge of the High Court) – 20 February 2009 – Lloyd's Law Reports [2009] Vol. 1, p. 418.

required another to appoint an arbitrator. In that sense, it invoked the arbitration agreement in the charter party and constituted a notice to commence arbitration. As to the second issue, the cross claim by the charterers against the shipowners was held not to be barred by Article III rule 6. The Court regarded all the claims and counterclaims together under the umbrella of the arbitration proceedings and did not apply the time bar separately to each claim and cross claim within the proceedings.

4.1.7 Article III rule 6bis

> *An action for indemnity against a third person may be brought even after the expiration of the year provided for in the preceding paragraph if brought within the time allowed by the law of the Court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself.*

Article III rule 6bis was introduced as a proviso to rule 6, and it provides a party with an extended period, which stretches beyond the 1-year time bar, allowing him to file a claim for indemnity against a third party. This additional period, allowing a liable party to file a claim for indemnity, will depend on the law of the Court seized but shall be no less than 3 months after the person seeking indemnity has settled the claim filed against him. In other words, the time prescribed by rule 6 bis applies where, for example, a shipowner A, being liable to cargo owner B, claims an indemnity from shipowner C. It is important to note that while the claim by shipowner A to shipowner C should be under a contract of carriage governed by the Hague-Visby Rules in order for Article III rule 6 bis to apply, there is no such requirement that the claim by cargo owner B against shipowner A should also arise under a contract of carriage to which the Hague-Visby Rules are applicable.[76]

4.1.8 Article III rule 7

> *After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier, to the shipper shall, if the shipper so demands be a 'shipped' bill of lading, provided that if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the 'shipped' bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted, if it shows the particulars mentioned in paragraph 3 of Article III, shall for the purpose of this article be deemed to constitute a 'shipped' bill of lading.*

Article III rule 7 grants the shipper the right to demand a "shipped" bill of lading, provided that he surrenders to the carrier any document of title[77] previously issued to

[76] *China Ocean Shipping Co. v The owners of the vessel "Andros" (The "Xingcheng" and "Andros")* – Privy Council (Judicial Committee) (Lord Bridge of Harwich, Lord Brandon of Oakbrook, Lord Brightman, Lord Goff of Chieveley and Sir Duncan McMullin) – 3 June 1987 – Lloyd's Law Reports [1987] Vol. 2, p. 210.

[77] This wording covers the definitions given in Art. I(b), and as such it will exclude a mate's receipt from the scope of this provision.

him by the carrier in accordance with Article III rule 3. The article goes further to specify that in case that the previously issued bill of lading is a "received for shipment" bill of lading, then no new bill is issued but instead the initial bill is usually stamped so that it shows that the goods have been loaded on board, which in essence converts the "received for shipment" bill of lading into a shipped bill of lading. The shipped bill is a classic form of a bill of lading which *"indicates that the goods have been loaded on board, or shipped on a named vessel"*.[78] By showing that the goods are already on board, the shipped bill vests the shipper with the advantage of having evidence as to the date of shipment.

4.1.9 Article III rule 8

> *Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.*

Article III rule 8 disables the carrier to go below the limits of liability that are statutorily determined by the Hague-Visby Rules. Although, *inter alia*, Article III rules 1 and 2 suggest that the obligations laid down thereby cannot be circumvented by the carrier, rule 8 expressly renders any such attempt to lessen liability null and void. In that sense, Art. III rule 8 can be perceived as the self-protective provision of the Convention. It does not prevent the parties to a bill of lading contract of carriage from agreeing on terms that stay outside the Convention, but it forbids limiting or eliminating the carrier's liability as set in the Rules. In other words, the article allows freedom of contract when the shipowner's liability, duties and obligations are increased, but this freedom to contract out is prohibited when it is done in the direction of diminishing those.

4.2 Article II

> *Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to loading, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth.*

This short article is crucial to the cargo-related duties of the carrier as it activates them and renders them applicable. It is this article which entitles the carrier with all his rights and immunities on the one hand, and obliges him to carry out all obligations and responsibilities with regard to a series of cargo operations.

The provision expressly states that the substantive rights and obligations *"in relation to loading, handling, stowage, carriage, custody, care and discharge"* are brought into play only under a contract of carriage. To understand the concept of the contract of carriage under the Hague-Visby Rules, one should look at Article I(b) which embodies a

[78] UCP 500 (1993 Revision), Art.23(a)(ii) on marine/ocean bills of lading.

documentary approach in defining the term.[79] Contracts of carriage are only those that are covered by a bill of lading or any similar document of title. This means that a contract of carriage should be differentiated from the contract to arrange carriage; from a contract for carriage, when a party contracts to procure carriage without undertaking the obligations of a carrier; and from a contract for the hire or use of a vessel.[80] However, the definition in Article I(b) goes on to include in its ambit also time or voyage charterer's bills of lading from the moment they start regulating the contractual relations between a carrier and a holder of such a bill of lading or document of title. The stipulation is derived from one of the policy goals of the Hague-Visby Rules, which is to protect third parties. In this way consignees or endorsees who were not part of the negotiation process between the charterer and the shipowner will be safeguarded from any burdensome terms laid down in the charter party contract of carriage, to which they are not a party.

By making Article II subject to Article VI, the proviso in the beginning of the sentence provides room for freedom of contract in specific circumstances, allowing the carrier and shipper to come to any terms as to the responsibility and liability of the carrier on the condition that their agreement is not contrary to public policy, or to the care or diligence of the servants or agents of the contracting parties with regard to loading, handling, stowage, custody, care and discharge of the goods. Moreover, the parties are allowed to circumvent the Rules only in the exceptional case when no bill of lading is issued but instead a non-negotiable receipt is issued to cover goods in an extraordinary non-commercial carriage.[81]

4.3 Article III rule 2

> *Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.*

The second paramount bundle of obligations embodied in the Hague-Visby Rules relates to the proper care for the cargo, including but no tlimited to its loading, stowing, lashing, dunnaging, handling, and discharging.

The provision in rule 2 is short and lacks precision. That is why it raises various important questions that have to be dealt with separately, namely: (a) what is the

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[79] See *Chapter I*, section 2 *supra*.

[80] For the difference between contract *of* carriage and contract *for* carriage, see: Richard Aikens, Richard Lord, Michael Bools – *'Bills of Lading'*, Informa Law (2006), London, ISBN-13: 978-1843114383, p. 233, para. 10.79.

[81] Article VI reads: *Notwithstanding the provisions of the preceding articles, a carrier, master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligation as to seaworthiness, so far as this stipulation is not contrary to public policy, or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, provided that in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a non-negotiable document and shall be marked as such.*
An agreement so entered into shall have full legal effect.
Provided that this article shall not apply to ordinary commercial shipments made in the ordinary course of trade, but only to other shipments where the character or condition of the property to be carried or the circumstances, terms and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement.

meaning of the phrase *"properly and carefully"* – is the obligation overriding in character like the duty set forth in rule 1, or is it an obligation of a lower standard; (b) what is the relationship between Article III rule 2 and the exceptions in Art. IV; (c) can the duty to load, handle, stow, carry, keep, care for, and discharge the goods carried be delegated to other parties; (d) when is the the carried under this duty; (e) what is the burden and order of proof.

(a) nature of the obligation and meaning of *"properly and carefully"*

Unlike the duty to provide a seaworthy ship, which was already discussed above, Article III rule 2 does not embody an overriding obligation.[82] Instead, this second important bundle of duties, to which a carrier is bound, has different nature and operation in cargo claims.

In the opinion of Sir Norman Hill, rule 2 of Article III *"is not a question of the carrier exercising due diligence"* as it is in rule 1, but *"[t]hat is an absolute obligation on the carrier during the voyage, and it is only qualified by the exceptions in Article 4."*[83] These remarks distinguish the duty in Article III rule 2 as one of absolute nature that is, it is not reduced to exercising due diligence only as is the case with Article III rule 1. Regardless of this cardinal difference in the nature of the two main bundles of obligations, it should be borne in mind that the same circumstances, for instance the presence of rats in the ship's holds before and during the journey, may be considered a cause for the breach of both rule 1 and rule 2 of Article III.[84]

Similarly, in *The "Aliakmon"*, where a consignment of steel coils was damaged during the voyage, the Counsel raised a seaworthiness argument about the lack of a system of mechanical ventilation on board the ship.[85] However, Staughton J found this to be a matter of stowage than a matter of unseaworthiness. The explanation for that reasoning lies in the facts of the case – the steel was found to be damaged by, first, the way the goods were stowed in the holds and, second, by the fact that the steel coils were carried in the same hold where there had already been timber. It was assessed that the coils would not have been damaged had it not been for the timber consignment, which, without mechanical ventilation, creates condensation and moisture.[86] To sum up, depending on the facts of the case, the very same circumstances can lead to filing an action for damaged or lost cargo based on either Article III rule 1, or Article III rule 2, or both. As Langley J pointed out in *The "Imvros"*, *"it is often not an easy question to*

[82] *Maxine Footwear Co Ltd v. Canadian Government Merchant Marine Ltd (The 'Maurienne')* – (Viscount Kilmuir (Lord High Chancellor), Lord Reid, Lord Tucker, Lord Somervell of Harrow and Lord Denning.) – Lloyd's Law Reports [1959] Vol. 2, p. 105.
[83] Comité Maritime International – *'The Travaux Préparatoires of the Hague and Hague-Visby Rules'*, p.185 at [83].
[84] *Cadbury Schweppes Plc and Others v Nigerian National Shipping Line Ltd and Another (The "River Ngada")* – Queen's Bench Division (Admiralty Court) (Belinda Bucknall Q.C., sitting as a Deputy Judge) – 17 July 2001 – Lloyd's Maritime Law Newsletter [2001] 570, p. 1.
[85] *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd. (The "Aliakmon")* – Queen's Bench Division (Commercial Court) (Staughton J) – Lloyd's Law Reports [1983] Vol. 1, p. 203
[86] *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd. (The "Aliakmon")* – Queen's Bench Division (Commercial Court) (Staughton J) – Lloyd's Law Reports [1983] Vol. 1, p. 203 at p. 208: *"It is true that without such a system she could not carry steel and timber in the same holds; but this I have classified as a complaint about stowage rather than seaworthiness."*

determine the moment when the line between bad stowage and unseaworthiness is crossed".[87]

With regard to the meaning of the words "*properly and carefully"*, it was clarified in the *"Pyrene v Scindia"* case.[88] In Devlin J's *dictum*, an interpretation of the phrase so as to mean that the carrier *"shall do whatever loading he does properly and carefully"* is more consistent with the object of the Hague Rules, rather than the more literal construction of the words, which is *"[that] the carrier shall load and that he shall do it properly and carefully"*. This first interpretation is preferred over the second one as the object of the Hague Rules are *"to define not the scope of the contract service but the terms on which that service is to be performed".*[89] In other words, the Rules specify the way in which these duties have to be performed, namely properly and carefully, and do not embody an obligation to perform *per se.*

The standard indicated by the phrase *'properly and carefully'* varies in accordance with the type of the voyage and the particular conditions that may occur throughout the journey. In *The "Bunga Seroja"* case, Gaudron, Gummow and Hayne stressed on the contrastingly different conditions that may occur, by stating that *"the proper stowage of cargo on a lighter ferrying cargo ashore in a sheltered port will, no doubt, be different from the proper stowage of cargo on a vessel traversing the Great Australian Bight in winter".*[90] Hence, the required degree of care is dependent on the voyage, the cargo on board, the carrying vessel, and the knowledge that the parties have or ought to have had about all these elements.

The word "carefully" means merely taking care and is considered by authors to be equivalent to the standard of reasonable care.[91] The latter is a subjective test to determine negligence, whereby the exercise of reasonable care is assessed and gauged by way of a comparison with what an ordinarily prudent and rational person would do in the same circumstances.

The construction of the word "properly", however, seems to be more problematic with regard to the element of skill that has to be exercised, and raises the issue whether this word conveys a higher standard of care. The *counsel* in another pivotal case, *Albacora S.R.L. v. Westcott & Laurance Line, Ltd. (The "Maltasian")*, tried to argue that the word "properly" meant *"in the appropriate manner looking to the actual nature of the consignment…irrelevant that the shipowner and ship's officers neither knew nor could have discovered that special treatment [is] necessary".*[92] The panel in that case, however, rejected such a wide construction, pointing out to the unreasonable result that it would lead to if such a burden was placed on carriers. Instead, the court upheld the interpretation given in the 1957 case *Renton v Palmyra (The "Caspiana")* where the

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[87] *The "Imvros"* [1999] 1 Lloyd's Law Reports 848 at p. 851.
[88] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* – Queen's Bench Division (Devlin J) – Lloyd's Law Reports [1954] Vol. 1, p. 321 at p. 328.
[89] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* – Queen's Bench Division (Devlin J) – Lloyd's Law Reports [1954] Vol. 1, p. 321 at p. 328. (*ibid*)
[90] *Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Cooperation Berhad* (*The "Bunga Seroja"*), Lloyd's Law Reports [1999], Vol. 1, p. 512 at point 34.
[91] John F. Wilson – *'Carriage of Goods by Sea'* (7th edition), Longman (2010), ISBN-13: 9781408218938, p. 191.
[92] *Albacora S.R.L. v. Westcott & Laurance Line, Ltd. (The "Maltasian")*, Lloyd's Law Reports [1966], Vol. 2, p. 53 at p.58.

word "properly" is construed so as to mean *"in accordance with a sound system"*, which adds something more to carrying the goods "carefully".[93] In *The "Maltasian"*, Lord Pearce and Lord Reid elaborate that this sound system does not follow to take into account all weaknesses and idiosyncrasies pertaining to a particular cargo but it shall rather reflect the general practice concerning the carriage of goods under the particular circumstances of the journey *"in light of all the knowledge which the carrier has or ought to have about the nature of the goods".*[94] Thus, *"[the word 'properly'] is tantamount, I think, to efficiency"*, Lord Pearce summarized.

On the facts of the case, *The "Maltasian"* concerned the carriage of wet salted fish from Glasgow to Genoa, which deteriorated during the voyage because it was carried in non-refrigerated compartments. The Court held that the carrier did not breach his duty to carry "properly and carefully" the cargo since the consignment was marked "Keep away from engines and boilers" – with which requirement the carrier complied – with no further instructions given by the consignors. Accordingly, the carrier was held to have applied a sound system in handling the cargo, and the damage was attributed to inherent vice of the cargo. The decision of the court in *The "Maltasian"* has become a reference point in later court decisions, and the case is cited by authors as a milestone in the interpretation of the words "properly and carefully".[95]

Interpreting the Hague Rules in a way that renders the content of the phrase "sound system" equal to an "efficient system", Lord Pearce refers to the common law position that he used as a guideline from which the Rules should not be radically different.[96] His reasoning further elucidates that the duty laid down in rule 2 is not an obligation of result but an obligation of means, that is, it is not aimed at achieving the desired safe arrival of the goods but at carrying out the operations in question carefully and properly.[97]

The reasoning in *The "Maltasian"* was adopted in the case *The "Rio Sun"*[98], where a consignment of crude oil deteriorated because it was not heated during the voyage, which led to some part of the oil, around 3,7%, becoming a hard waxy residue that could not be pumped. The judge ruled that there was no breach of Article III rule 2 on behalf of the shipowner since: the master did not deviate from standard practices and did not act carelessly; the great majority of crude oil worldwide, about 80%, does not require

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[93] *G. H. Renton & Co., Ltd. V. Palmyra Trading Corporation of Panama* (The "Caspiana") [1957] A.C. 149. This interpretation is upheld by Lord Pearce in *'Albacora S.R.L. v. Westcott & Laurance Line, Ltd.'* (The *"Maltasian"*), Lloyd's Law Reports [1966], Vol. 2, p. 53. The view is further supported also in: *Hilditch Pty Ltd v Dorval Kaiun KK (The "Golden Lucy 1")* (No 2) – Federal Court of Australia (NSW District Registry) (Rares J) – 14 December 2007 – Lloyd's Maritime Law Newsletter [2008] 741, p. 1.

[94] *Albacora S.R.L. v. Westcott & Laurance Line, Ltd. (The "Maltasian")*, Lloyd's Law Reports [1966], Vol. 2, p. 53 at p.58 and 62.

[95] M.L. Hendrikse, N.H. Margetson, N.J. Margetson – *'Aspects of Maritime Law: Claims under Bills of Lading'*, Kluwer Law International (2008), ISBN 13: 9789041126238, p. 77.

[96] This reference, again, shows the interrelation between the Rules and common law. See: section 3 of the current chapter.

[97] For an opposing view, see Justice Wright's reasoning in *'Gosse Millard v. Canadian Government Merchant Marine Ltd.'*, [1927] 2 K.B. 432, at p. 434: "The words "properly discharge" in Art. III., r. 2, mean, I think, "deliver from the ship's tackle in the same apparent order and condition as on shipment," unless the carrier can excuse himself under Art. IV …" However, such a construction of the rule is not upheld by following judgments.

[98] *Gatoil International Inc. v. Tradax Petroleum Ltd. Same v. Panatlantic Carriers Corporation (The "Rio Sun")* – Queen's Bench Division (Bingham J) – Lloyd's Law Reports [1985] Vol. 1, p. 350.

heating, and there was not clear evidence whether the oil that was carried necessitated heating; the master had never carried such crude oil before and had known nothing about it; conversely, he had always carried crude oil without heating it and had considered this to be the usual practice; he also did not receive any instructions to heat the oil. Based on these facts, the shipowners were entitled to the provision in Article IV rule 2(m), thus relying on the inherent vice exception.

Under certain circumstances, the duty to properly and carefully perform loading or unloading may well require the carrier to consult specialists and experts who can ensure that these operations could be successfully carried out. In *The "Happy Ranger"* the carrier was held liable for damage caused to heavy-lift cargo, which was dropped when the crane hook broke upon loading. The carrier was found, among other things, to have breached Article III rule 2 not only because of preparing a poor loading plan, but also because he failed to consult the classification society Lloyd's with regard to whether the cranes of the carrier's newly-built ship could handle the excessively heavy piece of machinery that was to be transported.[99]

Bottom line, both case law and legal literature[100] have shown that the level of care that a carrier is required to maintain cannot be gauged, and it depends on the facts of the case. In each case, the standard introduced by the term "properly and carefully" will depend on the particular cargo and the practices applied to that cargo, the voyage performed, the vessel employed as well as on the degree of knowledge that the carrier has on these factors.

(b) relationship with the provisions of Article IV

Unlike the obligation in rule 1, the one in rule 2 is expressly made subject to the exceptions laid down in Article IV. However, the level of care and the content of the obligation are not qualified by the exceptions listed in Article IV.[101] The result is that a party cannot lessen the duty laid down in rule 2 of Article III by invoking some of the exceptions in Article IV. Instead, the effect which the opening phrase of the rule has on the entire provision is that even if the carrier has breached the duty therein, he is entitled to a defence against his breach, provided he can prove that his case falls within the terms of the particular exception.

In this regard, the relationship between Article III rule 2 and Article IV follows the common law approach.[102] A carrier is bound to carry the cargo with reasonable care unless prevented by the excepted peril. For instance, in the case *The "Aconcagua"*[103], mentioned hereinabove, the charterers failed to perform their duty to *'properly and carefully load, handle, stow, keep, care for'* a container with a dangerous cargo, which they stowed next to a bunker tank that was heated during the voyage, causing the

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[99] *Parsons Corporation and Others v CV Scheepvaartonderneming Happy Ranger (The "Happy Ranger")* – Queen's Bench Division (Commercial Court) (Gloster J) – Lloyd's Law Reports [2006] Vol. 1, p. 649 at p. 664, para 70-71.

[100] Richard Aikens, Richard Lord, Michael Bools – *'Bills of Lading'*, Informa Law, London 2006, ISBN-13: 978-1843114383, p.254 at para. 10.146.

[101] *Great China Metal Industries Co. Ltd. v. Malaysian International Shipping Cooperation Berhad* (*The "Bunga Seroja"*), Lloyd's Law Reports [1999], Vol. 1, p. 512 at point 90.

[102] See section 3.1 *supra* on the carriers' responsibilities and liabilities over the cargo under common law.

[103] *Compania Sud Americana De Vapores SA v Sinochem Tianjin Import and Export Corporation (The "Aconcagua")* – Queen's Bench Division (Commercial Court) (Christopher Clarke J) – 24 July 2009 – Lloyd's Law Reports [2010] Vol 1, p. 1.

container to explode. However, the charterers were not held liable as the heating of the cargo was considered by the court an *'act, neglect, or default of the master, mariner, pilot, or the servants of the carrier…in the management of the ship'* and as such constituted an excepted peril under Article IV rule 2(a).

On the other hand, if the excepted peril occurs as a result of the carrier's failure to perform this duty, then he is held liable.[104] In the case *The "Golden Lucy 1"*[105], the carrier failed to discharge the cargo properly and carefully, and the recipient could see that the discharge operations were carried out badly and negligently but nevertheless he did not stop the discharge. The carrier submitted that this constituted act or omission of the owner of the goods within Article IV rule 2(i), thus seeking exoneration from liability. The court rejected the carrier's submission and stated that a carrier who does not comply with Article III rule 2 acts on his peril and cannot engage the defences in Article IV rule 2 by asserting that the cargo owners should direct the carrier in performing its responsibilities under Article III rule 2. In the court's dictum, to assume the opposite would be tantamount to contracting out of responsibility, which is something expressly prohibited by Article III rule 8.

(c) is the duty delegable or not

The question whether the carrier may contract out his cargo-related obligations gives rise to a lot of confusion. A literal construction of rule 2 clearly points to the carrier as the party who has to carry out this duty. There is no doubt that absent an agreement, which modifies the allocation of duties, it is the ship and her owner who are responsible for loading, stowing and discharging cargo, and the consequences of a failure to perform these tasks fall on them. Moreover, any such agreement relating to the obligation contained in Article III rule 2 is likely to be eventually rendered invalid by the Hague-Visby Rules. This is so, because objective and literal interpretation of the law will suggest that delegating this obligation to third parties will lessen a carrier's liability otherwise than as provided in the Rules and will be null and void by force of Article III rule 8.

However, the existing commercial practices point otherwise. The contractual delegation of the obligation to load, stow, trim and discharge the cargo has turned, therefore, into one of the three exceptions to the Hague-Visby Rules; the other two being the on-deck carriage and the carriage of live animals. In many cases the responsibility for loading/stowing/trimming/unloading was transferred from the carrier to the charterer. This practice has been recognized by the court in several English decisions such as the early *"Pyrene"*[106] and *"Renton"*[107] as well as the pivotal case *The "Jordan II"*.[108] In the latter case, Lord Steyn provided a solid and comprehensive argument in his interpretation of Article III rule 2. He commented that the Hague Rules partly

[104] See *Grill v General Iron Screw Collier Company (1866) L.R. 1 C.P. 600.*
[105] *Hilditch Pty Ltd v Dorval Kaiun KK (The "Golden Lucy 1")* (No 2) – Federal Court of Australia (NSW District Registry) (Rares J) – 14 December 2007 – Lloyd's Maritime Law Newsletter [2008] 741, p. 1.
[106] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* – Queen's Bench Division (Devlin J) – Lloyd's List Law Reports [1954] Vol. 1, p. 321.
[107] *G.H. Renton & Co. Ltd. v. Palmyra Trading Corporation of Panama*, Lloyd's Law Reports [1956], Vol. 2, p. 379.
[108] *Jindal Iron and Steel Co. Ltd. and Others v Islamic Solidarity Shipping Co Jordan Ltd. (The "Jordan II")* – Lloyd's Law Reports [2005], Vol. 1, p. 57.

harmonized the diverse national laws by means of regulating freedom of contract in certain areas only. That is why, in his opinion, the seaworthiness obligation in Article III rule 1 was undoubtedly a fundamental obligation which cannot be transferred, whereas the cargo-related obligation in Article III rule 2 consisted of tasks, some of which (in particular loading, stowing and discharge) were of less fundamental character and, therefore, the owner could delegate them to another party.[109]

Thus, the non-mainstream practice of incorporation in the bill of a clause which expressly allocates the legal responsibilities and the functions of the parties regarding loading, stowage and discharging of cargo has turned in some jurisdictions into a permissible deviation from the Rules.[110] Such a clause is generally called FIOS(T), which can be found in the Gencon charter party or in clause 8 of the NYPE charter party. In essence, the clause provides that the charterer instead of the shipowner will bear the costs and risk associated with loading, stowing, trimming and unloading the cargo.

With regard to the validity of FIOS(T) clause, it has been already established that under English law parties are at liberty to allocate in their contract of carriage the various operations involved regarding the loading, stowing, and discharging the cargo. This precedent, which has been in existence since the 1950s judgments in the *"Pyrene v Scindia"* and the *"Renton v Palmyra"* cases, will be carefully analyzed in *Chapter III* of the thesis that is dedicated to the carriage of goods on FIOS(T) terms. Other crucial court judgments that are relevant to the problem such as *The "Jordan II"*, *The "Eems Solar"*[111], *'The Coral'*[112], *'Ismail v. Polish Lines'*[113] as well as the Dutch Supreme Court case *The 'Favoriet'*[114] will also be reviewed under scrutiny.

(d) when does this duty arise and when does it cease

Unlike the duty regarding seaworthiness, which applies before and at the beginning of the voyage, the obligation to *"properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"* is a continuing one and carriers should perform it throughout the contractual journey.

The relevant period throughout which a carrier is under the duty set in Article III rule 2, and in particular the moment when it begins and when it ceases, represents a central problem for allocating the liability for cargo which is damaged upon loading or discharge. Solutions to these issues are found in the provisions which define the operation and applicability of the Rules. In order to outline the limits of this particular period, Devlin J construed Articles I(b), (e), and II in the pivotal case *"Pyrene v Scindia"*, where goods were damaged after they were delivered to the carrier but before they

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[109] *Jindal Iron and Steel Co. Ltd. and Others v Islamic Solidarity Shipping Co Jordan Ltd. (The "Jordan II")* – Lloyd's Law Reports [2005], Vol. 1, p. 57 at p. 63.

[110] It should be noted that internationally there is no dominant view as to the legality of the free in/free out agreements. For the confronting national views on the validity of the FIOST clause, see *Chapter III*, section 3.

[111] *Yuzhny Zavod Metall Profil LLC v Eems Beheerder B.V. (The "Eems Solar")* – Queen's Bench Division (Admiralty Court) (Jervis Kay Q.C., Admiralty Registrar) – 5 June 2013 – Lloyd's Law Reports [2013] Vol. 2, p. 489.

[112] [1993] 1 Lloyd's Rep. 1, 5.

[113] [1976] Q.B. 893.

[114] SCN 19 January 1968, NJ 1968, 20.

passed the ship's rail.[115] Although the central issue in this case is related to the immunities and protection from liability under the Hague Rules, the *dictum* given by Devlin J regarding the temporal operation of the Rules has to be discussed as it is considered undoubtedly correct by authors and judiciary.[116]

Article I(b) states that:

> *[a] "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by water, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter-party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same;*

Then paragraph (e) of Article I lays down the definition of "carriage of goods", which

> *…covers the period from the time when the goods are loaded on to the time they are discharged from the ship.*

In *"Pyrene v Scindia"*, Article I(e) is construed as a tool for identification of the first and the last of a series of operations, which constitute the carriage, and not as a time marker as the rights and liabilities under the Hague Rules are not attached to a period of time but to a specific contract of carriage, and therefore paragraph (e) serves merely *"to assist in the definition of contract of carriage"*.[117] An argument for this view is found in the word *"covers"*, which is far from being specific and does not intend to specify a precise moment of time.

Furthermore, Devlin J rejected the submission by the claimants that loading should be divided into two parts (the first being lifting the cargo to the ship's rail and the second one being taking the cargo on board and stowing it), and that the first stage, namely the operations on the shore side of the ship's rail, fell outside the operation of the Rules. Instead, he ruled that the ship's rail has no longer such significance in transferring risk and liabilities.[118] He pointed out that Article I(e) of the Hague Rules should apply to the entire process of loading, even when the goods haven't crossed the ship's rail yet. Accordingly, the operation of the Rules is determined by the contract of carriage, and not by a time limit, and the duty set in Article III rule 2 is thus activated upon the first cargo-related operation listed in Article II in accordance with what the parties have agreed in their contract.

An important observation is that the period of responsibility of the carrier is not affected by the so called FIOS(T) clause, which is discussed in details in *Chapter III*, and

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[115] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* – Queen's Bench Division (Devlin J) – Lloyd's List Law Reports [1954] Vol. 1, p. 321.

[116] See *'Clive M. Schmitthoff's selected essays on international trade law'*, Martinus Nijhoff Publishers, London (1988), p. 292; and *Balli Trading Ltd. v Afalona Shipping Co. Ltd. (The "Coral")*, Lloyd's Law Reports [1993] Vol. 1, p. 1.

[117] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* – Queen's Bench Division (Devlin J) – Lloyd's List Law Reports [1954] Vol. 1, p. 321, at p. 327-328.

[118] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* – Queen's Bench Division (Devlin J) – Lloyd's List Law Reports [1954] Vol. 1, p. 321, at p. 329: *"Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail"*.

which generally transfers some or all of the cargo-related obligations of the carrier to the shipper. As it will be further observed in the next Chapter, this clause is a mere delegation of certain duties but the carrier remains otherwise responsible for the cargo (*e.g.* he is obliged to care for the cargo): *"[…] the whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide".*[119] Having noted that, it is important that no stages of the cargo-related operations are excluded from the contract of carriage even when they are delegated to another party.[120]

Furthermore, the carrier's responsibility over the cargo may end upon discharging the goods into lighters.[121]

Terminating the period of responsibility of the carrier is also a problem that deserves a more thorough comment. It is common knowledge that delivery of the cargo may take place after the discharge operations are completed – delivery may, for instance, take place at the warehouse. In such a situation, a major determinant whether the period of responsibility ends upon completing discharge or upon delivery is the fact whether the bill of lading has been duly surrendered (in which case it becomes a spent bill of lading). This is so because the contract is fully discharged only when the bill is surrendered and there are no obligations pending on either side.[122] Therefore, should the B/L be not surrendered, the carrier period of responsibility will also cover the period between discharge of the cargo from the vessel until delivery. If, on the other hand, the bill of lading is surrendered, the period of responsibility of the carrier under the Rules will end upon completion of discharge and he may limit his liability, otherwise than under the HVR, for misdelivery or for loss or damage that the goods, for example, sustained in the warehouse.[123]

These difficulties reflect the scope of the 1924 Convention (tackle-to-tackle) as opposed to the scope of modern-day contracts of carriage. Both the Hague Rules and the Hague-Visby Rules do not concentrate much on the process of delivery of the goods. That subject is addressed in the Convention only with respect to the starting of the notice period and the time bar period.[124] That is why it is arguable whether delivery is a statutory obligation under the Rules and, what is more, there is no uniformity on that matter.[125] The rationale in the Rules in that regard is based on a practice that was common decades ago – namely that, when the ship arrives at the port, the consignee and holder of the bill of lading was present on-site to claim his goods, which means that the

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[119] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* – Queen's Bench Division (Devlin J) – Lloyd's List Law Reports [1954] Vol. 1, p. 321 at pp. 328-329.
[120] *Filikos Shipping Corporation of Monrovia v Shipmair B.V. (The "Filikos")* – Court of Appeal – [1983] 1 Lloyd's Law Reports 9, at p. 11: *"I am not satisfied that the effect of cl. 4 [a free-out clause] is to eliminate the discharge stage from the contract of carriage and give delivery of the cargo to the charterer-consignee in situ in the holds."* (Sir John Donaldson, M.R.).
[121] *The "Arawa"* – Queen's Bench Division (Admiralty Court) (Brandon J) – Lloyd's Law Reports [1977] Vol. 2, p. 416.
[122] P&O Nedlloyd B.V. v Arab Metals Co and Others (*The "UB Tiger"*), Lloyd's Law Reports [2006] Vol. 1, p. 111.
[123] Paul M. Bugden and Simone Lamont-Black – *'Goods in Transit and Freight Forwarding'*, 2nd edition (2010), p. 340-341.
[124] Article III rule 6 HVR.
[125] Gertjan van der Ziel – *"Delivery of the Goods"*, published in *"The Rotterdam Rules 2008"* / ed. Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, pp. 189-218, at p. 189.

contract of carriage becomes discharged with the completion of unloading of the cargo. Nowadays, this is not necessarily the case as contractual arrangements have become much more complicated. The discussion about the carrier's period of responsibility is yet another example that the Hague-Visby Rules are outdated in more than one aspect.

(e) burden and order of proof

The burden of proof in a cargo claim under the Hague-Visby Rules is far from difficult to be established, and yet in many cases it is a critical issue for asserting liability. In order to invoke Article III rule 2, particularly, a shipper must first prove loss or damage to the goods, while they were in the position of the carrier, which shifts the burden to the latter. The claimant shippers or cargo owners need neither to establish how the damage or loss occurred nor to adduce evidence of fault on behalf of the carrier. Instead it suffices for them only to establish that the cargo was damaged or lost while it was in the custody of the carrier.[126] If they succeed in showing this, they prove a contentious fact which is a sufficient component in their claim. Put differently, a refutable presumption of liability is created by proving that the carrier has received the goods under a clean bill of lading and then has delivered them in a bad order and condition. This presumption is implied by Article III rule 4 of the Hague-Visby Rules and the phrase *"prima facie"* found therein suggests that it can be rebutted.[127]

On that point the carrier has two options – he can either rebut the allegation of the shipper, and thus overturn his claim, by proving absence of causation, meaning that the carrier must prove that, on the facts, the cause for the loss was not his fault or negligence and that he fulfilled his obligations under Article III rule 2 to exercise proper and careful care in the handling of the cargo; or he can resort to the defences provided in Article IV and thus legally excuse himself from liability. In the former scenario, the burden reverts back to the claimant who should disprove the defence of the carrier, while in the latter scenario, where the defendant carrier proves that his case qualifies for an exception, the burden falls again on the claimant who must show negligence on behalf of the carrier, which will disentitle the defendant to rely on the exception invoked.

To sum up, the burden of proof has a fault-based liability framework with reversed order. Professor Schoenbaum is correct in noting that the burden of proof *"shifts more frequently than the winds on a stormy sea"*.[128] While this system is not so clearly codified in the Hague-Visby Rules, it has been developed and shaped by the courts.[129]

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[126] *Lagos Group Ltd and Others v Talgray Shipping Inc* (*The "MV Hamilton I"*) – Queen's Bench Division (Commercial Court) (Andrew Smith J) – 11 January 2002 – Lloyd's Maritime Law Newsletter [2002] 580, p. 3.

[127] The first sentence of Article III rule 4 reads: *"Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as described in accordance with paragraph 3 (a), (b) and (c)."*

[128] Thomas J. Schoenbaum – *'Admiralty and Maritime Law'* (Fifth Edition), Thomas Reuters (2011), Volume 1, Chapter 10, p. 884 at § 10-25.

[129] *Contracts for the International Carriage of Goods Wholly or Partly by Sea'* (2009), Lawtext Publishing limited, Chapter I, p. 3.

[129] D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'* (2009), Lawtext Publishing limited, Chapter I, p. 9, fn. 71.

The question of the burden of proof is of utter significance in cases which contain completely unexplained events.[130] For example, in *The "Devon"*[131] the defendant buyers Petronas alleged that at the point of discharge the cargo of high-viscosity oil did not meet the contractual specification of up to 1% water content, and hence Petronas refused to pay for the price and rejected the cargo. On the facts, the oil was loaded in Yanbu, Saudi Arabia on the transferring vessel *Centaur* and then through a ship-to-ship transfer at Port Sudan on the receiving vessel *Devon*, which carried the cargo to Singapore. Various measurements and samples were taken at all stages of the voyage. They revealed that the water content in the shore tanks before loading was 0.2%; no free water was found in the tanks of the *Centaur* vessel prior loading and no water was found in the cargo after it was loaded and before the ship-to-ship transfer took place; traces of water were found only in the tanks of the *Devon* vessel after the cargo was discharged but these traces were well within the contractual specifications of 1%. The unusually high content of water in the oil was found in shore line samples at the oil terminal in Singapore only after the receiving vessel *Devon* started discharging. The Court of Appeal did not fall in the fallacy of *The "Popi M"*[132] and, affirming the first instance ruling, came to the conclusion that the appellant Petronas were unable to prove on the balance of probabilities that the cargo was contaminated with water on the *Devon* vessel and, accordingly, the claimant sellers of the cargo were entitled to the full price of the cargo. The contamination was indeed a mystery but Petronas was not able to discharge the burden of proof and hence their appeal on that issue was dismissed.

4.4 Carriers' cargo-related duties under charter parties

Charter parties are not statutorily governed by the Hague Rules, Hague-Visby Rules or any other international maritime regime. Instead they are regulated by the general provisions of contract law and by arbitral and judicial decisions that interpret the usually standardized clauses found in a charter party.[133] Of course, bills of lading issued to a third party pursuant to a charter party will be rendered subject to the Hague/Hague-Visby Rules.[134] For example, a shipowner transporting bulk or break bulk

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[130] Eric Van Hooydonk (Ed.) – *'English and Continental Maritime Law: After 115 Years of Maritime Law Unification, a Search for Differences between Common Law and Civil Law'* Maklu-Uitgevers NV, Antwerpen-Apeldoorn (2003), ISBN: 62158099, p. 73.

[131] *FAL Oil Co. Ltd. and Another v Petronas Trading Corporation Sdn Bhd (The "Devon")*, Court of Appeal (Judge, Buxton and Mance LJJ), 7 July 2004, EWCA Civ 822, Lloyd's Law Reports [2004] Vol. 2, p. 282.

[132] *Rhesa Shipping Co SA v Edmonds (The "Popi M")* – Queen's Bench Division (Commercial Court) (Bingham J) – 30 March 1983 – Lloyd's Law Reports [1985] Vol. 2, p. 1. The fallacy in this non-cargo-related case was that the trial Judge (Bingham J) was balancing on the probabilities whether the ship *Popi M* sunk off in calm seas and fair weather either as a result of a collision with a submarine or due to the wear and tear of the ship's hull. The choice between the highly-improbable submarine theory and the wear-and-tear theory, which he deemed virtually impossible, was considered to be wrong reasoning at the appeal. The House of Lords quoted Sir Arthur Conan Doyle's character Sherlock Holmes, telling Dr. Watson: *"when you have eliminated the impossible, whatever remains, however improbable, must be the truth"*, and pointed out that Sherlock Holmes' reasoning, however logical, cannot lead to a proper fact finding process. Instead of being compelled by the dilemma between choosing an extremely improbable cause and a virtually impossible one, Bingham J should have ruled that the claimant shipowners had failed to discharge the burden of proof which lay on them.

[133] See *Chapter I*, section 2.2 *supra*.

[134] This is expressly stipulated in the second sentence of Article V: *"The provisions of these Rules shall not be applicable to charter parties, but if bills of lading are issued in the case of a ship under a charter party they shall comply with the terms of these Rules."* This is developed further in the definition of a "contract of carriage" in Article I(b): *"including any bill of lading […]issued under or pursuant to a charter party from the*

cargo, which has been sold on FOB terms, will usually conclude a charter party with the buyer (since, according to Incoterms 2010, it is the buyer's obligation to provide a transporting vessel), meaning that their contractual relationship will not be governed by a liability regime unless agreed otherwise.[135] Whereas when such cargo is carried in the case of a preceding CIF or CFR sale, the charterer will be the CIF/CFR seller of the goods (according to Incoterms 2010, the seller must contract for the carriage of the goods), and the bills of lading issued by the shipowner to the seller (charterer) pursuant to the charter party, will be subsequently negotiated/transferred to the CIF/CFR buyer of the goods who, vis-à-vis the carrier, is a third party B/L holder, meaning that their contractual relationship will be governed by the bills and, hence, will be subject to the statutory provisions of the respective liability regime applied.

Additionally, a charter party may become affected by a liability regime also in case that the parties choose to expressly incorporate a convention such as the Hague-Visby Rules, or parts of the Rules, to their charter party contract of carriage. The incorporation clause is referred to as Clause Paramount and it should be a proper and logical statement of the intention of the parties. In fact, nowadays many standard forms of time charters (NYPE, Shelltime) and voyage charters (Gencon, Asbatankvoy) are Hague or Hague-Visby Rules based and have a Clause Paramount either printed or added as a rider clause. The clause will guarantee that even when the Rules do not apply compulsory, they will apply by contract.[136] Depending on the incorporation, this may create a situation where the shipowner and the charterer shall in their disputes refer to the clauses in the charter party, except for matters envisaged in the Hague-Visby Rules. In other words, if the Rules are incorporated in their entirety, all charter party terms and conditions which are contrary to the Rules will be rendered null and void. In that sense the Rules can be applicable to charter parties as well.

4.4.1 Legal issues relating to the loading and stowing of cargo

As mentioned above, charter party contracts of carriage lie outside the ambit of the Hague-Visby Rules. Hence, the transfer of the responsibility for loading and stowage of the cargo from the shipowner to the charterer does not cause such a conundrum. Yet, the delegation of this duty has been a subject of debate in the industry and in law. In a charter party contract of carriage, the charterer is obliged to make the cargo available to load, but the duty to properly and carefully load, stow and unload the cargo normally stays with the shipowner. However, many charter forms, such as the NYPE form,[137] provide to the contrary and allow for the transfer of these duties to the charterer. The result is that it is the charterer who is responsible for performing these operations, and in case that the shipowner must compensate a cargo owner under a bill of lading for lost or damaged cargo, the charterer must subsequently indemnify the shipowner.[138]

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moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same".

[135] Contracts of sale and the International Commercial Terms (Incoterms) go beyond the scope of the current thesis and, therefore, they will not be elaborated.

[136] See *Chapter I*, section 2.1.3 *supra* on the effect of the Clause Paramount on the bill of lading.

[137] Clause 8(a), lines 103-105, of NYPE 93 provides: *"[T]he Charterers shall perform all cargo handling, including but not limited to loading, stowing, trimming, lashing, securing, dunnaging, unlashing, discharging, and tallying, at their risk and expense, under the supervision of the Master."*

[138] Stephen Girvin – *'Carriage of Goods by Sea'*, (2nd edition), Oxford University Press (2007), ISBN: 978-0-19-876458-8, p. 529.

When it comes to loading operations, nowadays shipping practices and modern technical developments have made needless the outdated "over the ship's rail" rule, whereby the loading operations were traditionally divided between shipowners and charterers in accordance with whether the goods have crossed the ship's rail.[139] This is mainly due to the fact that the ship's tackle is no longer the major means of loading and/or discharging the cargo as nowadays these operations are usually performed either by mechanical equipment, such as cranes and elevators, or by professional stevedores who may be hired either by the shipowners or by the charterers.[140] The appointment of stevedores by the charterers (thus, the stevedores will be acting as the charterers' agents) leads to another modern shipping practice, which is the transfer of certain cargo-related obligations from the shipowners to the charterers via a FIOS(T) clause that is included in the charter party.

Usually, three main questions underlie the transfer of the obligations to load, stow, trim, and discharge the cargo: first, this is the question of who is the party that will actually perform these obligations; secondly, this is the question of cost, or who is the party that will pay for them; and the third question is the one of responsibility, or who is the party that will be held liable for cargo damage that may take place thereby. The applicability and enforceability of such a clause (FIOS) under a charter party will be addressed in detail in *Chapter III*, section 4.4 below. This free-in/free-out contractual arrangement has given rise to various legal problems, which have been addressed on numerous occasions by English courts, and these will be thoroughly analyzed in the abovementioned section of *Chapter III*.

4.4.2 Legal issues relating to the discharge and delivery of cargo

It is common ground that a carrier is under the implied obligation to deliver the cargo to the party entitled to receive the goods, *i.e.* the consignee as stated in the bill of lading. Prior to doing that, the master of the vessel is required to tender a notice of readiness (NOR), which is in essence a paper or a telex document. This is to inform the notify party awaiting shipment that their cargo has arrived and is ready to be discharged.

As discussed in the introductory *Chapter I*, a bill of lading is a document of title and therefore a carrier should deliver the cargo only to a lawful holder of a bill of lading. Otherwise, he may be held liable for misdelivery and breach of contract or for the tort of conversion. Commercial realities, however, sometimes necessitate shipowners to face certain risks when they are asked by the charterers to deliver the cargo, against a letter of indemnity (LOI), to a party who does not hold a document of title or whose document of title is invalid (*e.g.* a "to order" bill of lading, which has not been endorsed). Releasing cargo against a letter of indemnity is neither wrong nor unusual, but this commercial decision hides its risks.

First of all, although the letter of indemnity represents a comfort against any claim, by accepting to release the cargo without production of the bill of lading, the shipowner loses his P&I cover.

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[139] This is recognized by Devlin J in *'Pyrene v Scindia'*. See section 4.3(d), footnote 118 above.

[140] Dr. Theodora Nikaki – *'The loading obligations of voyage charterers'*, printed in 'The Evolving Law and Practice of Voyage Charterparties' (edited by Prof. D. Rhidian Thomas), Informa Law (2009), ISBN 978-1-84311-808-4, p. 59, at p.60.

Secondly, a master should be aware that the undertakings in the letter of indemnity are conditional upon delivery of the goods to the party named therein.[141]

The third risk concerns the peculiar situation where the letter of indemnity is issued by the receiver to the charterer, and then the shipowner is sued for wrongful delivery. Can a shipowner rely on the letter of indemnity issued to the charterer? Two English cases answer this question in the affirmative. In both *The "Laemthong Glory"*[142] and *The "Jag Ravi"*[143], the court ruled in favour of the shipowners who succeeded in arguing that they were agents of the charterers in delivering the goods to the receivers and as such benefited from The Contracts (Rights of Third Parties) Act 1999, which allows a non-contracting party to enforce part or all of the contract. Accordingly, the receivers had to indemnify the shipowners following the letter of indemnity issued by them to the charterers.

Another important consideration as regards discharge and delivery of the cargo under charter parties is that these two may take place at a different moment. This situation will arise when the bill of lading contains FIO arrangements,[144] and more precisely free-out terms. In this case delivery will place before discharge because the shipowner has contracted out the duty to unload the cargo and, hence, as soon as the holds are opened and the goods are ready to be discharged, delivery is deemed to be completed.

On the other hand, delivery may take place after discharge if this is set in the contract of carriage. In this case, the shipowner is bound by the Hague-Visby Rules, provided the Rules have been incorporated in the charter party, only until the completion of the discharge operations due to the period of operation of the respective liability regime.[145] From the moment the goods are discharged from the ship up until their delivery, the shipowner may limit his liability in case of, for example, misdelivery or when cargo has been damaged or lost in a warehouse.

5. The obligations of the carrier over the cargo under the Rotterdam Rules

5.1 The launch of a new liability regime: foreword

The very name of the Convention,[146] as opposed to the Hague-Visby Rules (International Convention for the Unification of Certain Rules of Law relating to Bills of Lading), indicates that the Rotterdam Rules are contractually oriented. This notion can be derived also by the format and way of drafting of the particular international instrument – while the style of the Hague-Visby Rules follows the architecture of a bill of

[141] *Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The "Bremen Max")* – Queen's Bench Division (Commercial Court) (Teare J) – Lloyd's Law Reports [2009] Vol. 1, p. 81.
[142] *Laemthong International Lines Company Ltd v Artis (The "Laemthong Glory")* – Queen's Bench Division (Commercial Court) (Colman J) – 7 October 2004 – Lloyd's Law Reports [2005] Vol. 1, p. 100.
[143] *Great Eastern Shipping Co Ltd v Far East Chartering Ltd and Another (The "Jag Ravi")* – Court of Appeal (Longmore LJ, Tomlinson LJ, Davis LJ) – 9 March 2012 – Lloyd's Law Reports [2012] Vol. 1, p. 637.
[144] See *Chapter III – The FIOS(T) clause* below.
[145] See the Hague-Visby Rules, Art $I_{(e)}$ and *"Pyrene v Scindia*".
[146] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea.

lading, the Rotterdam Rules assume a style of a legal instrument that is something more than a liability regime. The Rotterdam Rules go further and have been developed as a convention on the contract of carriage. The result is a complex structure consisting of 96 articles divided in 18 chapters, which reflects the purpose behind the new Convention – to provide uniform regulation of contracts for the international carriage of goods wholly or partly by sea.

Although the phrase "new Convention" has been widely used throughout this section, it should be emphasized that authors perceive the Rotterdam Rules as an evolutionary instrument rather than a revolutionary one.[147] The rationale behind the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules), in a narrow sense, is to substitute the leading international liability regime, the Hague-Visby Rules, which, although being accepted and favoured for over 80 years by the international shipping community, have not been implemented uniformly and is, moreover, nowadays significantly dated. Even the Visby protocol was signed only in the beginning of the container era and by that time door-to-door contracts of carriage were not a benchmark in international shipping. Not to mention that the protocol did not change significantly the 1924 Hague Rules, which, being already 90 years old, are the kernel of the Hague-Visby Rules. Thus, the Rotterdam Rules strive to **modernize** the law by closing the gaps between the Hague-Visby Rules and the modern-time shipping practices such as containerization, the use of electronic transport documents, and multimodal carriage of goods which provides door-to-door service. In this context, the analysis will focus on how and to what extent the provisions of the new Convention will alter the carrier's obligations and liabilities over the cargo. Furthermore, the book will try to find an answer to the question whether the new liability regime is capable of achieving commercial predictability in international shipping transactions should it come into force.

In a wider sense, the philosophy behind the UN Convention is the replacement of the *status quo*, which comprises of a rather chaotic system of outdated maritime liability regimes (the Hague Rules, the Hague-Visby Rules, the Hamburg Rules) as well as national and regional alternatives, and also hybrid regimes that incorporate some elements from both the Hague (Visby) Rules and the Hamburg Rules.[148] This is the reason why some authors are of the opinion that international sea transport law is a victim of fragmentation.[149] Achieving **harmonization** in the legal framework of international carriage of goods by sea was a key goal already in 1920s when the Hague-Rules were drafted. This is evidenced by the very name of the convention: International Convention for the *Unification* of certain Rules of Law Relating to Bills of Lading [emphasis added]. However, the legal context of nowadays international carriage of goods by sea is undoubtedly characterized by disparity and a lack of harmony and a universal system for carriage of goods, which results in legal uncertainty and the

[147] D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'* (2009), Lawtext Publishing limited, Chapter I, p. 30.
[148] Such an example is the Maritime Code of the People's Republic of China (1993).
[149] Theodora Nikaki – *'The Carrier's Duties under the Rotterdam Rules: Better the Devil You Know?'*, Tulane Maritime Law Journal, Vol. 35, No 1 (Winter 2010), p. 1.

ensuing increased legal expenses that the shipping industry is facing.[150] That is why this section of the current thesis will deal also with the question whether the new international regime can indeed achieve the intended worldwide **uniformity**[151] as well as with the impact it would be likely to have should the Rules be ratified and adopted. Promoting uniformity is statutorily set in Article 2 of the new Convention,[152] which suggests that the ambition of the drafters is the creation of a global regime. The introduction of uniform shipping laws worldwide will promote maritime commerce because shipping is an international industry. Uniformity will also promote clear judicial rules, which will facilitate courts when they have to apply foreign law and to adjudicate on a case between parties with diverse nationality.

It should be reminded that the drafting and ratification of an international Convention alone is only the first step towards uniformity of law. Once a Convention is ratified, the new provisions must be properly and uniformly enacted by the relevant legislative body in all contracting states, and, equally important, these provisions must be then interpreted in an identical manner by the Court so that they provide uniform and predictable results everywhere.[153] Ideally, if this goal is achieved, all parties involved in sea shipping will be afforded legal certainty as the law will be applied uniformly wherever a dispute is adjudicated. The more predictable the results, the less necessary it will be for the parties to resort to litigation when settling their disputes and the easier it is for them to efficiently allocate the risks.[154]

5.2 Defining the principal parties to a contract of carriage

Since the new Convention stretches beyond the sea leg of a carriage of goods, and thus regulates more complex commercial and legal relationships, it includes definitions and terminology which designate parties that were unknown to previous liability regimes. The *"performing party"* and the *"maritime performing party"* are a novelty and unique concepts introduced by the Rules.

The "carrier" under the Rotterdam Rule is the contractual carrier, namely the *"person that enters into a contract of carriage with a shipper"*.[155] This definition follows the approach taken by the Hague-Visby Rules, which means that it is expressly open-ended and not at all exhaustive. Yet, the contractual nexus under the Rotterdam Rules

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[150] Lorena Sales Pallarés – *'A Brief Approach to the Rotterdam Rules: between Hope and Disappointment'*, Journal of Maritime Law and Commerce Volume 42, p. 453, at p. 455.

[151] Note that some authors emphasize on the division between "unification" and "harmonization" – the former being the adoption of similar substantive rules by sovereign states, whereas the latter signifies the adoption of the same rules which cannot be altered by national interpretation – and point to "harmonization" as to the more accurate of the two. Yet, the current thesis follows the terminology laid down in the Rules and, hence, the term "uniformity" shall be employed hereby. See Hannu Honka – *'The Legislative Future of Carriage of Goods by Sea: Could it not be the UNCITRAL DRAFT?'*. Retrieved from: http://www.scandinavianlaw.se/pdf/46-4.pdf.

[152] Article 2 of the Rotterdam Rules provides that: *"In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade."*

[153] Francesco Berlingieri – *'Uniform Interpretation of International Conventions'*, [2004] L.M.C.L.Q. 153, at p. 154.

[154] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – '*The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), ISBN 978-1-84703-734-3, p. 3, para. 1.012.

[155] The Rotterdam Rules, Chapter 1, Article 1.5.

may be on a unimodal sea basis as well as on a multimodal basis as long as there is a sea leg in the transportation process.[156] Moreover, the new convention adds up these two additional definitions mentioned above – the performing party and the maritime performing party. The Rotterdam Rules define the contractual carrier but make no mention of an actual carrier, as it is under the Hamburg Rules for example[157], and yet these two new principal actors may be the actual carrier.

A "performing party", as the name suggests, is a person[158] other than the carrier who performs the carrier's obligations under the contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, and who is under the carrier's direct or indirect supervision or control.[159] The inference derived from this definition is that any or all of these operations listed above can be sub-contracted by the carrier to a performing party, which means that a performing party may be an ocean carrier, an inland carrier, a stevedoring company, a terminal or warehouse operator, but he may well be an agent of the carrier, an independent contractor, or a sub-contractor.[160] The performing party is thus defined in a very broad way and it includes essentially everyone who acts on the side of the carrier. There are, however, several requirements laid down in the definition that should be met by a party in order to qualify for a performing party. First, a performing party should be a natural or legal person other than the carrier himself. Secondly, the performing party should, besides having a connection with the carrier, perform or undertake to perform at least one of his specific contractual obligations listed in Article 1.6(a): receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods. Thirdly, a performing party should act, directly or indirectly, at the carrier's request or under his supervision or control. The rationale behind this wording is seen as to make the definition able to embrace any contractual chain no matter how long it is.[161]

A "maritime performing party" is a sub-category of the performing party that performs or undertakes to perform any of the obligations of the carrier but only within the period between the arrival of the goods at the port of loading and their departure from the port of discharge.[162] Thus, a maritime performing party may include a sea subcarrier[163], tug boats (as long as they are actually towing the vessel and not merely

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[156] D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Lawtext Publishing Limited (2009), ISSN 1478-8586, Chapter 3, p. 56.

[157] The Hamburg Rules, Part I, Article 1.2: *"'Actual carrier' means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted."*

[158] The term *"person"* is perceived to include both natural persons and legal persons such as companies, corporations and different types of entities. See: Kerim Atamer – *'Construction Problems in the Rotterdam Rules regarding the Performing and Maritime Performing Parties'*, Journal of Maritime Law and Commerce (October 2010), Vol. 41, p. 469 at p. 475.

[159] The Rotterdam Rules, Chapter 1, Article 1.6.

[160] D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Lawtext Publishing Limited (2009), ISSN 1478-8586, Chapter 3, p. 57.

[161] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), ISBN 978-1-84703-734-3, Chapter V, p. 135, para. 5.150.

[162] The Rotterdam Rules, Chapter 1, Article 1.7.

[163] A sea carrier assumes the status of a maritime performing party, under the Rotterdam Rules, where the sea carriage has been sub-contracted to him by the contractual carrier.

assisting in navigation), stevedores, terminal operators, warehouse keepers, lightering or barge operators, independent lashing and stowing companies as well as inland carriers provided that they perform their services exclusively within the area of the port.[164]

The performing party and the maritime performing party are the product of the "maritime plus" concept of the new Convention and its extended material scope of application, whereby the carrier's period of responsibility can stretch from door to door in cases of multimodal transport. The inclusion of stages of the carriage that are complementary to the maritime leg introduced these two new parties. The performing party is perceived to be involved on the carrier's side in a door-to-door carriage, whereas the maritime performing party's involvement is confined within the port-to-port stage.[165] Equally important is that the new Convention treats differently these two new actors. Maritime performing parties are rendered subject to the same obligations and liabilities that are imposed on the carrier and are entitled to same defences and limits of liability, given that some conditions are fulfilled.[166] On the other hand, performing parties (referred to by some authors as non-maritime performing parties for the sake of easier differentiation) are recognized by the Rotterdam Rules, but not incorporated in the liability regime of the Rules and, hence, no duties are imposed on them. Therefore, the obligations and liabilities owed by a non-maritime performing party under a multimodal contract of carriage with a sea leg are to be assessed by the relevant applicable law and not by the Rules.

5.3 Identity of the carrier

As observed in the introductory chapter above, identifying the defendant carrier can be an obscure matter. Often claimants, when confronted with this problem, cannot penetrate through the façade of the various transportation documents and thus their contractual counterpart may remain unknown. The bill of lading holder has to identify on whose behalf the master is acting when issuing the bill of lading. This could be either the vessel owner or the charterer as in cases where the vessel is sub-chartered there may be the issue of identifying *which* charterer precisely is the contractual carrier.

The approach taken in the Rotterdam Rules provides a straightforward solution to that problem. Article 37 assists the shipper in identifying its contractual counterpart in the following way:

> ***Article 37***
> ***Identity of the carrier***
>
> *1. If a carrier is identified by name in the contract particulars, any other information in the transport document or electronic transport record relating to the identity of the carrier shall have no effect to the extent that it is inconsistent with that identification.*
>
> *2. If no person is identified in the contract particulars as the carrier as required pursuant to article 36, subparagraph 2 (b), but the contract*

[164] Frank Smeele – *'The Maritime Performing Party in the Rotterdam Rules 2009'*, European Journal of Commercial Contract Law (EJCCL) 2010–1/2, p. 72 at p. 81.
[165] Kerim Atamer – *'Construction Problems in the Rotterdam Rules regarding the Performing and Maritime Performing Parties'*, Journal of Maritime Law and Commerce (October 2010), Vol. 41, p. 469 at p. 478.
[166] The Rotterdam Rules, Chapter V, Article 19.

> *particulars indicate that the goods have been loaded on board a named ship, the registered owner of that ship is presumed to be the carrier, unless it proves that the ship was under a bareboat charter at the time of the carriage and it identifies this bareboat charterer and indicates its address, in which case this bareboat charterer is presumed to be the carrier. Alternatively, the registered owner may rebut the presumption of being the carrier by identifying the carrier and indicating its address. The bareboat charterer may rebut any presumption of being the carrier in the same manner.*
>
> *3. Nothing in this article prevents the claimant from proving that any person other than a person identified in the contract particulars or pursuant to paragraph 2 of this article is the carrier.*

The provision is an elaborate attempt to deal with any issue that may occur in identifying the contractual carrier. The three paragraphs envisage three circumstances. First, when the carrier's name is found on the contract particulars, this information shall be paramount as any information found in the transport document or electronic transport record that is inconsistent with it shall have no effect, which means that any demise or identity of carrier clauses found in a bill of lading will be invalidated.[167] The second paragraph gives a solution when no carrier is named in the contract particulars. In this case, a rebuttable presumption is created that the contractual carrier is the registered owner, on whose vessel the goods have been loaded. The shipowner may rebut this presumption in two ways: he can either prove that the vessel has been under a bareboat charter at the time of the carriage and indicate the charter's address, which the bareboat charterer may likewise rebut in his turn, or indicate the true contractual carrier and provide his address. The third paragraph keeps the option open for a claimant to prove that a party is the contractual carrier regardless of which party is indicated as a carrier pursuant to paragraphs 1 and 2 of this article. These three rules are all-embracing and they significantly facilitate a claimant when choosing which party to sue in case of short, damaged or lost cargo. What is more, the cargo interests under the Rotterdam Rules can claim against two parties at the same time, because the carrier and one or more maritime performing parties are jointly and severally liable.[168]

5.4 The obligations of the carrier over the cargo

5.4.1 Introduction

Chapter 4 of the Rotterdam Rules is dedicated to the obligations of the carrier. An important remark is that the heading of the chapter is not entirely indicative of its content. Of all the six articles in the chapter, three provisions (Article 11, 13, and 14) lay down obligations *per se* for the carrier, one provision (Article 12) stipulates the period of responsibility of the carrier, and two provisions (Article 15 and 16) actually provide certain rights for the carrier. The reason why these two latter articles were included in that chapter is that they were contemplated by the draftsmen as exceptions to the

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[167] For the problems posed by a demise clause or an identity of carrier clause, see: *Chapter I*, section 2.2.3.2, p. 23, fn. 84.

[168] The Rotterdam Rules, Article 20, para 1: *"If the carrier and one or more maritime performing parties are liable for the loss of, damage to, or delay in delivery of the goods, their liability is joint and several but only up to the limits provided for under this Convention."*

obligations of the carrier and as such, and to that extent, they belong to Chapter 4.[169] Last but not least, the Rotterdam Rules were designed as an instrument that is, above all, pragmatic and capable of solving practical issues, which can partly explain the peculiar order of the provisions on the obligations of the carrier.[170]

To begin with, in its part on defining the duties of the carrier, the new Convention mostly assumes the philosophy of the Hague-Visby Rules by laying down positive duties for the carrier.[171] In particular, the contents of Article III rules 1 and 2 HVR is preserved, albeit with certain amendments and modifications which go beyond the relevant Hague/Hague-Visby provisions. Together with the traditional duties already introduced by the Hague/Hague-Visby Rules, the Rotterdam Rules impose additional duties for the carrier, such as the duty to receive the goods (Article 13 RR) and the duty to deliver them to the consignee (Article 11 and 13 RR). Secondly, the new Convention explicitly embodies issues that have been implicit in prior international liability regimes. For instance, the Rotterdam Rules expressly cover in Article 1.1 and Article 11 the core duty of the carrier to carry the cargo from one place to another, whereas under the Hague-Visby Rules this is only implicitly assumed.[172] Thus, the new Convention represents a modified and updated version of the Hague/Hague-Visby Rules so far as the carrier's obligations are concerned.

With regard to the two traditional and fundamental obligations – the ones related to the cargo (Article 13) and to the ship (Article 14) – they have underwent certain modifications under the new Convention to the extent that they exceed in scope the corresponding provisions of the Hague-Visby Rules – Article III rule 1 and 2, respectively. It should be noted, however, that Articles 13 and 14 of the Rotterdam Rules modify the content of the respective Hague-Visby provisions only insofar as to adapt the obligations of the carrier to the extended multimodal scope of the new Convention, which applies to door-to-door carriage, and to the new technology and modern shipping practices.[173] The general observation is that, having expressly defined in detail all core functions of the carrier, the new Convention seems to be well calibrated and with better architecture as regards the obligations of the carrier over the cargo.

The cargo-related obligation, which is laid down in Article 13.1 of the Rotterdam Rules, requires the carrier to *"properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods"*. There are three novelties in this provision as opposed to the corresponding Article III rule 2 of the Hague-Visby Rules. First, reception and delivery of the goods are now included among the functions that a carrier has to perform. Secondly, and most importantly, Article 13.2 allows some of these tasks

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[169] These insights of the author of this thesis were confirmed during personal discussions with prof. Gertjan van der Ziel – Professor Emeritus of Transport Law, Erasmus University Rotterdam and Head of the Netherlands Delegation to UNCITRAL WG Transport Law.

[170] Philippe Delebecque – *'Obligations of the Carrier'*, published in: *'The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'* / ed. Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, Alphen aan den Rijn : Kluwer Law International (2010), ISBN9789041131485, p. 71, at p. 74.

[171] Dr. Theodora Nikaki – *'The Fundamental Duties of the Carrier under the Rotterdam Rules'*, (2008) 14 JIML, p. 512 at p. 513.

[172] See section 4.1 *supra* for a summary of the duties owed by the carrier under the Hague-Visby Rules.

[173] Dr. Theodora Nikaki – *'The Carrier's Duties under the Rotterdam Rules: Better the Devil You Know?'*, Tulane Maritime Law Journal, Vol. 35, No 1 (Winter 2010), p. 1.

to be contracted out and performed by the shipper, the documentary shipper or the consignee. Thirdly, the provision is titled "Specific obligations", as opposed to the following article regarding seaworthiness named "Specific obligations applicable to the voyage by sea". This wording, combined with the "maritime plus" nature of the convention, suggests that the scope of this second obligation is not restricted to sea carriage only but is applicable also for the non-sea legs of the journey. Hence, the carrier is obliged to care for the cargo throughout the period of his responsibility, irrespective of the mode of transport employed in the performance of the contract of carriage. Again, the provisions regulating the bundle of cargo-related duties, namely Article 13.1 as well as Article 11 of the Rotterdam Rules, are in the centre of attention of the current thesis and, as such, particular attention will be devoted to them in the following sub-sections below.

A few words will be dedicated to the other fundamental obligation as well – the one related to the vessel. Article 14 of the Rotterdam Rules follows the three aspects of seaworthiness as laid down in Article III rule 1 of the Hague-Visby Rules.[174] The provision comprises (i) the ship's physical condition, which is her actual seaworthiness; (ii) her proper manning and crewing; (iii) and the fitness of the ship's holds and other parts, which is commonly referred to as a ship's cargoworthiness. Following the Hague-Visby Rules approach, the obligation to provide a seaworthy vessel under the Rotterdam Rules is not a duty of an absolute nature, as it is under common law, but it is reduced to a duty to exercise due diligence to ensure that the vessel is seaworthy.[175] Likewise, the duty is non-delegable since Article 18 renders the carrier liable for failure in carrying out his duties, even when the carrier entrusts the particular tasks to his employees, agents, independent contractors (*i.e.* performing parties), or any person who acts directly or indirectly at the carrier's request or under his supervision or control.

However, Article 14 of the Rotterdam Rules amends the seaworthiness obligation in several ways. First of all, the duty is extended to cover the whole sea journey, which means that carriers should exercise due diligence during the voyage and not only before and at the beginning of it as it is under the Hague-Visby Rules. This is also highlighted by the wording of the particular provision – the Hague-Visby Rules' Article III rule 1 (a), which reads *"Make the ship seaworthy"*, has been modified in the Rotterdam Rules' Article 13.1 into *"Make and keep the ship seaworthy"*. The change of the relevant time at which a carrier is under the said obligation is justified by the UINCITRAL on the grounds that it would be in line with the International Safety Management (ISM) Code and the latest safe shipping requirements.[176] Another argument in support of imposing this obligation upon the carrier also during the journey is that communication has improved nowadays and advanced tracking systems allow easy and constant contact between carriers and their vessels while they are at sea.[177] Yet, extending the obligation so as to include the voyage does not compel carriers to exercise the same diligence and to have the same behaviour before and at the beginning of the journey on the one hand, and

[174] See *Chapter II*, section 4.1.1 *supra*.
[175] See *Chapter II*, section 4.1.1 *supra*.
[176] Working Group III (Transport Law), 9th session (New York, 15-26 April 2002) – UNCITRAL Preliminary draft instrument on the carriage of gods by sea. See: A/CN.9/WG.III/WP.21, para. 61.
[177] UNCITRAL Report of the Working Group III (Transport Law) on the work of its ninth session. See: A/CN.9/510 of 7 May 2002, para. 43.

during the journey on the other, so as to meet the requirement set in Article 14. In that sense, authors remind that a different degree of diligence is due when, for example, a ship is at a safe port and when it is in a winter ocean storm since, apparently, a reasonable carrier is expected to exercise more care in the former situation given the particular circumstances.[178]

Secondly, the Rotterdam Rules modify the duty to exercise due diligence so as to include container-worthiness as well (besides seaworthiness and cargoworthiness), and thus to take into account the importance of containerization in nowadays international shipping.[179] It should be noted, however, that the provision applies only to containers that are supplied by the carrier and not to those supplied by the shipper. The latter qualify as goods by force of Article 1.24.

5.4.2 The obligation to carry and deliver the goods (Article 11)

Article 11

Carriage and delivery of the goods

The carrier shall, subject to this Convention and in accordance with the terms of the contract of carriage, carry the goods to the place of destination and deliver them to the consignee.

Article 11 of the Rotterdam Rules is a novelty in comparison with the Hague-Visby Rules as it expressly imposes on the carrier the obligation to carry and deliver the goods subject to the provisions of the new Convention and of the respective contract of carriage.[180] The article should not be viewed in isolation as the obligation enshrined therein is also supplemented by the provisions in Article 1.1[181] and Article 13.[182] Accordingly, the carrier is required, against payment of freight, to properly and carefully carry the goods from one place to another and deliver them to the consignee at the place of destination, which may not necessarily be the port of discharge, as specified under the contract of carriage.[183] The consignee is stated, under Article 1.11, to be the *"person entitled to delivery of the goods under a contract of carriage or a transport document or electronic transport record"*.

In addition, the words *"in accordance with the terms of the contract of carriage"*, found in Article 11, produce the effect that the obligation to carry the goods does not go beyond what would be recognized under contract law, which is why some authors

[178] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), ISBN 978-1-84703-734-3, Chapter V, p. 85, para. 5.023.

[179] The Rotterdam Rules, Chapter 4, Article 14 (c).

[180] In comparison, Article III rule 1 of the Hague-Visby Rules lays down how the contract of carriage should be carried out but there is no provision that explicitly states that the carrier must perform the core obligation under the contract of carriage, which is to carry the goods.

[181] Article 1.1 states: *"Contract of carriage" means a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another. The contract shall provide for carriage by sea and may provide for carriage by other modes of transport in addition to the sea carriage.*

[182] See *Chapter II*, section 5.4.3 *infra*.

[183] The reason why Article 11 speaks of "place of destination" instead of "port of discharge" is that the Convention must be in line with its *maritime plus* character, and, accordingly, the carrier's cargo-related obligation to carry and deliver the goods may extend even to a non-sea leg of the carriage if the last mode of carriage is not a sea-going vessel.

question the practical use of the provision.[184] What this article actually requires from the carrier is, in essence, to perform the contract. Thus, the wording of Article 11 limits the scope of the obligation to what has been agreed in the contract of carriage, meaning that the carrier is not obliged to carry the goods *per se* but only to perform the carriage to the extent of what he contracted. For example, the carrier is not under the obligation to perform a door-to-door carriage if he preferred and contracted to provide only port-to-port services.

Another implication which stems from the words *"in accordance with the terms of the contract of carriage"* is that parties are actually free to insert into their contracts of carriage other terms that are outside the ambit of the convention.[185] However, a contract, which is missing the carrier's obligation to carry the goods from one place to another, does not constitute a contract of carriage within the Rotterdam Rules, simply by inference of the definition laid down in Article 1.1.

Article 11 may seem redundant especially in the light that any of the prior maritime legal regimes do not have a corresponding provision, and yet they proved to have functioned properly. However, one practical importance of Article 11 is that, as already pointed out in section 3.1 above, it provides rules on misdelivery, which is delivery of the goods in undamaged condition but to the wrong person. In contrast, since the Hague-Visby Rules do not have a corresponding provision, misdelivery of the goods under some jurisdictions is not considered breach of the Rules but a breach of the contract of carriage.[186] The Rotterdam Rules put an end to the dispute whether misdelivery constitutes breach of the Hague or Hague-Visby Rules or not (and, hence, whether the limitations of liability apply) by redefining carrier's core functions to carry and deliver the cargo as obligations in Article 11. Thus, misdelivery under the Rotterdam Rules simply qualifies as a breach of one of carrier's cargo-related obligations, which is to deliver the goods to the consignee.

5.4.3 The obligation to exercise care for the cargo (Article 13)

Article 13

Specific obligations

1. The carrier shall during the period of its responsibility as defined in article 12, and subject to article 26, properly and carefully receive, load, handle, stow, carry, keep, care for, unload and deliver the goods.

2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the

[184] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), ISBN 978-1-84703-734-3, p. 80, para. 5.012.

[185] Philippe Delebecque – *'Obligations of the Carrier'*, published in: *'The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'* / ed. Alexander von Ziegler, Johan Schelin, Stefano Zunarelli, Alphen aan den Rijn: Kluwer Law International (2010), ISBN 9789041131485, p. 71, at p. 76.

[186] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – 'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea', Sweet & Maxwell (2010), ISBN 978-1-84703-734-3, p. 81, para. 5.012, fn. 36.

documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.

Article 13 is the main provision enshrining the carrier's cargo-related obligations. Although the duties enlisted therein are referred to by the drafters as core responsibilities or core obligations,[187] the heading of the provision may suggest that there is something particular and specific about these obligations. However, one should not put too much emphasis on the heading "specific obligations" as the article simply enumerates general obligations of the carrier that are related to the cargo. This discrepancy can be explained with the logic and consistency of the system employed in the Rotterdam Rules, which codifies the duty of the carrier to carry and deliver the goods (Article 11) and thus the remaining cargo-related duties are systematized as specific tasks that are distinguishable from the general obligation. Nonetheless, such a conundrum is of little practical significance.

As already established, Article 13 RR originates from Article III rule 2 of the Hague-Visby Rules.[188] In both provisions – Article III rule 2 of the HVR and Article 13 of the RR – the cargo-related obligation is a continuous one but while in the Hague-Visby Rules this is implied, the Rotterdam Rules expressly state that the duty of care of the cargo applies during the whole period of responsibility of the carrier that is, during the time the carrier has custody of the goods.[189] Thus, under a door-to-door contract of carriage, the carrier will be under the obligation to perform these particular tasks with respect to all legs and stages of the carriage.

In essence, the respective provisions of both regimes represent a bundle of cargo-related duties that the carrier is bound to perform. Article 13 of the Rotterdam Rules, however, modifies these duties in several ways, and this modification will be observed from three perspectives: (a) the content of the obligation; (b) its scope of operation, and (c) the possibility to be delegated to other parties.

(a) content of the obligation

Firstly, Article 13.1 enumerates a wide range of tasks that a carrier has to perform properly and carefully: to receive, load, handle, stow, carry, keep, care for, unload, and deliver the cargo. During the discussions of UNCITRAL's Working Group III on Transport Law, these duties were referred to as "core responsibilities", "core obligations", and "core functions".[190] The default position is that the carrier is responsible for performing these duties, and in case the goods are damaged or lost as a result of a failure to perform any of them properly and carefully, he will be liable for a breach of contract. The standard used to clarify the term *"properly and carefully"* is derived from the construction of the corresponding Article III rule 2 of the Hague-Visby Rules. The extensive jurisprudence on the interpretation of the said term has been intentionally preserved by the drafters of the Rotterdam Rules.[191] In this way the well-

[187] See A/CN.9/WG.III/WP.21, para. 17; A/CN.9/WG.III/WP.21, para. 93; A/CN.9/544, para. 31.
[188] See *Chapter II*, section 4.3 *supra*.
[189] See Article 13.1 of the Rotterdam Rules.
[190] See A/CN.9/WG.III/WP.21, para. 17; A/CN.9/WG.III/WP.21, para. 93; A/CN.9/544, para. 31. (*id.* footnote 193)
[191] Working Group III (Transport Law), 9th session (New York, 15-26 April 2002) – UNCITRAL Report of the Working Group on Transport Law. See: A A/CN.9/510, para. 117

forged jurisprudence under the Hague-Visby Rules conveys the same meaning to the term *"properly and carefully"* under the Rotterdam Rules. Therefore, the appropriate degree of care is the same under both regimes, namely the carrier must carry out his duty of care in accordance with a sound system in the light of all knowledge which he has or ought to have had about the nature of the goods.[192]

The duty of care of the cargo applies only to those operations which the carrier agrees to perform.[193] Therefore, there is no absolute obligation on the carrier to properly and carefully load, handle, stow or unload the goods but the provision rather imposes on the carrier the obligation to properly and carefully carry out only the tasks for which he assumed responsibility in the contract of carriage.[194] Such a position reflects the interpretation of the term *'properly and carefully'* given by the English court that the carrier *"shall do whatever loading he does properly and carefully"*.[195] In addition, pursuant to an agreement between the carrier and the shipper under Article 13.2 of the Rotterdam Rules, the shipper will also be bound to properly and carefully perform loading, handling, stowing and/or unloading of the cargo.[196]

At first glance, the obligations enumerated in Article 13 follow neatly the obligations listed in Article III rule 2[197] of the Hague-Visby Rules but for two additional duties that are included in the new convention. The novelty in the updated list of obligations is that the carrier is required also to receive the goods and to deliver them to the consignee. These two additional duties are necessitated by the door-to-door scope of the Rotterdam Rules and the ensuing extended period of responsibility of the carrier.[198] Although enumerated among the others, the two obligations have a distinct nature as they – unlike loading, handling, stowing, and unloading – cannot be contracted out in accordance with Article 13.2. This means that the duties to receive and deliver the goods cannot be performed by other parties but only by the carrier. Hence, as observed by some authors, a situation may arise where, with regard to the same cargo, a carrier will be responsible for the ultimate delivery of the goods to the consignee even when the unloading operations are carried out by the shipper.[199] Another result of including, in particular, the duty to deliver the cargo among the other cargo-related obligations is that claims for misdelivery will be based on the Rotterdam Rules, whereas, by contrast, the

[192] See *Chapter II*, section 4.3(a) *supra* on the meaning of the term "properly and carefully" in Article III rule 2 of the Hague-Visby Rules.
[193] Article 13.2 of the Rotterdam Rules allows parties to agree that part of these duties can be delegated to the shipper, the documentary shipper or the consignee.
[194] See *Chapter II*, section 4.3(a) *supra* on the interpretation of the term *"properly and carefully"*.
[195] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* – Queen's Bench Division (Devlin J) – Lloyd's Law Reports [1954] Vol. 1, p. 321 at p. 328.
[196] The Rotterdam Rules, Chapter 7, Article 27.2.
[197] The word "discharge" is substituted by the drafters with "unload" for stylistic purposes since the former term belongs specifically to maritime terminology, whereas the door-to-door scope of the Rotterdam Rules may require the carrier to unload the goods during a non-sea leg. That is why a more common term, such as "unload", was deemed more appropriate. See: Working Group III (Transport Law), 9th session (New York, 15-26 April 2002) – UNCITRAL Report of the Working Group on Transport Law. See: A A/CN.9/510, para. 117.
[198] See section 5.5 *infra*.
[199] Yvonne Baatz, Charles DeBattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, Michael Tsimplis – *'The Rotterdam Rules: A Practical Annotation'*, Informa Law (2009), ISBN 1843118246, Chapter 4, p. 38.

Hague-Visby Rules do not provide for rules on misdelivery.[200] Thus, under the Rotterdam Rules, the carrier may rely on the liability exclusion provisions (Article 17) or on the liability limitation provisions (Article 59) in case of alleged misdelivery.[201]

With regard to the duty of the carrier to receive the goods, Article 13 should be interpreted in the light of Article 12.1, reading that *"[t]he period of responsibility of the carrier […] begins when the carrier […] receives the goods for carriage"*, and of Article 27.1, stating that *"[…]the shipper shall deliver the goods ready for carriage."* Read together, these two articles induce authors to make the inference that this specific obligation to receive the goods is placed on the carrier only with respect to goods that are intended for carriage.[202] Alternatively, if a carrier receives goods for other purposes, such as storage until further instructions on behalf of the cargo interests, the Rotterdam Rules will not be triggered and it will be the relevant provisions of national law that will apply.[203]

(b) scope of operation

Secondly, the temporal scope of operation of Article 13 is inextricably linked to the period of responsibility of the carrier as set in Article 12.[204] Accordingly, the period of the obligation to exercise care over the cargo has been extended, as compared to the Hague-Visby Rules, and now it comprises possible non-sea legs of the journey as well. Thus, Article 13 applies not only during the period between loading the goods on the ship and discharging them from it, but it may also apply during the time while the goods are under the control or possession of the carrier before loading and after discharge. The result is that Article 13 will apply to any mode of transport that is employed under the contract of carriage, and this is a result of the door-to-door scope of the Convention. However, Article 13.1 provides for a reservation over the extended scope of the obligation, making it subject to Article 26 on the carriage preceding or subsequent to sea carriage:

> ***Article 26***
>
> ***Carriage preceding or subsequent to sea carriage***
>
> *When loss of or damage to goods, or an event or circumstance causing a delay in their delivery, occurs during the carrier's period of responsibility but solely before their loading onto the ship or solely after their discharge from the ship, the provisions of this Convention do not prevail over those provisions of another international*

[200] D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Lawtext Publishing Limited (2009), ISSN 1478-8586, Chapter 4, p. 92.

[201] The Rotterdam Rules dedicate an entire chapter (Chapter 9) to the problem of delivery of the goods, as particular rules can be found in Articles 45-47 related to delivery of the goods in the various instances when a negotiable or a non-negotiable transport document is issued.

[202] D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Lawtext Publishing Limited (2009), ISSN 1478-8586, Chapter 4, p. 94.

[203] Ibid. D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Lawtext Publishing Limited (2009), ISSN 1478-8586, Chapter 4, p. 94, fn. 26. See also Dr. Theodora Nikaki – *'The Fundamental Duties of the Carrier under the Rotterdam Rules'*, (2008) 14 JIML, p.512 at p. 515.

[204] See *Chapter II*, section 5.5 *infra* on the period of responsibility of the carrier under the Rotterdam Rules.

> *instrument that, at the time of such loss, damage or event or circumstance causing delay:*
>
> *(a) Pursuant to the provisions of such international instrument would have applied to all or any of the carrier's activities if the shipper had made a separate and direct contract with the carrier in respect of the particular stage of carriage where the loss of, or damage to goods, or an event or circumstance causing delay in their delivery occurred;*
>
> *(b) Specifically provide for the carrier's liability, limitation of liability, or time for suit; and*
>
> *(c) Cannot be departed from by contract either at all or to the detriment of the shipper under that instrument.*

In case of conflicting provisions between the Rules and a unimodal international convention, Article 26 ensures the priority of the unimodal instrument regarding the period before loading and after discharge of the goods if the unimodal convention would have applied under a separate and direct contract between the shipper and the carrier in respect of that particular stage of the carriage; if it specifically makes a provision on the carrier's liability, limitation of liability, or time for suit; and if it cannot be contractually departed from to the detriment of the shipper. Hence, if the international unimodal instrument – regulating, for example, the carriage by road, rail or air – meets these preconditions, the carrier can be exempted from liability under the Rotterdam Rules during the period before loading and after discharge, and in this case it will be that other international instrument that will govern his liability. It should be reminded that Article 26 does not extend to national laws. Equally important, the Rotterdam Rules give way to a relevant unimodal convention, under the circumstances described above, only with regard to localized damages that took place before loading or after discharge. Alternatively, in case that the loss, damage or delay in delivery took place during more than one transport leg or if the moment of that damage or loss cannot be identified, which is usually the case with containerized cargo,[205] then it will be the Rotterdam Rules that apply.

After having explored the effect of Article 26, as it is, on Article 13.1, mention may here be made that the reference to Article 26 (*"The carrier shall during the period of its responsibility as defined in article 12,* ***and subject to article 26****, properly and carefully…" [emphasis added]*) is actually wrong because it is the result of a drafting mistake. During the negotiations, the Working Group subjected Article 13.1 to Article 26 indeed, but that Article 26 had a different content and was, in fact, a different provision. The initial Article 26 was related to what is known as mixed contracts of carriage whereby, in case of a successive carriage under one contract of carriage, a carrier could be responsible only for one part of the voyage, whereas he could act as an agent (or quasi freight forwarder) for the shipper for another part of the carriage under a through bill of lading.[206] Such a provision was highly criticized by part of the shipping industry for

[205] Francesco Berlingieri – *'Multimodal Aspects of the Rotterdam Rules'*, p. 6. Retrieved from: http://www.rotterdamrules2009.com/cms/uploads/Def.%20tekst%20F.%20Berlingieri%2013%20OKT29.pdf

[206] Although eventually deleted from the Rotterdam Rules, this is an existent practice in international trade, acknowledged by UNCITRAL (9th Session Report, para 41-42), whereby a carrier issues a through B/L purely to satisfy the needs of the cargo interests (for example, a CIF or CFR seller) to show that he conforms to the requirements of the contract of sale to provide transportation up to the final destination set in the sale

limiting too much the carrier's contractual obligations to carry and deliver the goods and was, therefore, abandoned whereas the draft Article 26 was deleted. Thus, Article 26 became the one that we can find nowadays in the Rotterdam Rules but the drafters omitted to make a corresponding correction in Article 13.1 by deleting the reference phrase *"and subject to article 26"*. A modification of Article 13.1, however, cannot be now made because this matter concerns a point of substance and it will not be merely a correction of a technical drafting error. Such technical amendments have already been made with regard to, for example, Article 1(6)(a) and Article 19(1)(b)[207] following the procedure for the correction of errors in texts or in certified copies of treaties laid down in Article 79(2) of the Vienna Convention on the Law of Treaties.[208] In the case of Article 13.1, however, such an amendment is not possible.[209]

(c) transferability of the obligation

Thirdly, Article 13.2 renders part of the cargo-related duties delegable to other parties. Thus, the second paragraph of the provision virtually upholds the contentious FIOS(T) clause,[210] which will be further analyzed in detail in *Chapter III*, section 5.

5.5 The period of responsibility of the carrier (Article 12)

Establishing the temporal scope of a carrier's responsibility is essential for determining at what point the cargo-related obligations arise and when they cease. The nature of the Rotterdam Rules (being a maritime plus instrument with a "door to door" scope of application) predetermines the extended operation of the Convention, as compared to the Hague-Visby Rules, and thus the longer period of responsibility of the

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contract. The through B/L will indicate the contractual carriage between point of shipment and point of destination but it will also indicate a further final destination, for which the carrier has not undertaken as it will be a third-party carrier which will perform the carriage. In case of such a third-party shipment, the obligations of the carrier to carry and deliver will end upon the completion of the contractual voyage under the contract of carriage. This will be the point of destination under the contract of carriage but it will also be an intermediate destination under the sale contract. With regard to the successive carriage up to the final destination, transportation will take place under an independent contract of carriage, in which the carrier will contract only as a freight-forwarding agent of the shipper (the CIF/CFR seller) and will undertake that the goods will be shipped by a third party. See: Alexander Von Ziegler – *'The Liability of the Contracting Carrier'*, Texas International Law Journal, Vol. 44, Spring 2009, p. 329 at pp 335-336.

[207] The word *"keeping"* was added to the definition of a "performing party" in Article 1(6)(a) as it had been omitted. On the other hand, Article 19(1)(b) had a more serious technical error which was due to a fault in the renumbering of the items within subparagraph (b). The new language of the article included the words "and either" at the end of Article 19(1)(b)(i). See: Michael F. Sturley – *'Amending the Rotterdam Rules: technical corrections to the U.N. Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Journal of International Maritime Law (2012), Vol. 18, Issue 6, p. 423.

[208] Article 7, paragraph 2 of the Vienna Convention on the Law of Treaties provides:

> *2. Where the treaty is one for which there is a depositary, the latter shall notify the signatory States and the contracting States of the error and of the proposal to correct it and shall specify an appropriate time-limit within which objection to the proposed correction may be raised. If, on the expiry of the time-limit:*
>
> *(a) no objection has been raised, the depositary shall make and initial the correction in the text and shall execute a procés-verbal of the rectification of the text and communicate a copy of it to the parties and to the States entitled to become parties to the treaty;*
>
> *(b) an objection has been raised, the depositary shall communicate the objection to the signatory States and to the contracting States.*

[209] The author owes these observations to Prof. Gertjan van der Ziel.

[210] The draftsmen of UNCITRAL's Working Group III (Transport Law) admit that the FIOS clause is a useful provision that takes into account commercial practice, which, however, regulates an area of law that is fraught with discrepancies among legal systems. See: UNCITRAL Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008), Doc A/CN.9/645, para 46.

carrier. Article 12 prescribes that this period stretches from the moment when a carrier or a performing party receives the goods up until they are delivered to the consignee.

> ***Article 12***
> ***Period of responsibility of the carrier***
>
> *1. The period of responsibility of the carrier for the goods under this Convention begins when the carrier or a performing party receives the goods for carriage and ends when the goods are delivered.*
>
> *2. (a) If the law or regulations of the place of receipt require the goods to be handed over to an authority or other third party from which the carrier may collect them, the period of responsibility of the carrier begins when the carrier collects the goods from the authority or other third party.*
>
> *(b) If the law or regulations of the place of delivery require the carrier to hand over the goods to an authority or other third party from which the consignee may collect them, the period of responsibility of the carrier ends when the carrier hands the goods over to the authority or other third party.*
>
> *3. For the purpose of determining the carrier's period of responsibility, the parties may agree on the time and location of receipt and delivery of the goods, but a provision in a contract of carriage is void to the extent that it provides that:*
>
> *(a) The time of receipt of the goods is subsequent to the beginning of their initial loading under the contract of carriage; or*
>
> *(b) The time of delivery of the goods is prior to the completion of their final unloading under the contract of carriage.*

Formulated this way, the provision sets a period of responsibility which covers the time during which the carrier has possession or control of the goods either personally or through a performing party. That is, the period of responsibility of the carrier under the Rotterdam Rules coincides with the period during which he is in charge of the goods, and it is important to note that this period will not start if the shipper fails to deliver the goods to the carrier.

The third paragraph of Article 12 of the Rotterdam Rules, however, allows contractual deviation from the period outlined in the first two paragraphs, but only if the deviation does not go beyond the tackle-to-tackle concept that can be found in, and that originates from, Article I (e) of the Hague-Visby Rules.[211] In other words, following the door-to-door principle, the new Convention keeps the carrier responsible from the moment he receives the goods, may that be at the manufacturer's premises, until their delivery, which may well be the buyer's warehouse inland. Strictly speaking, the period of responsibility is thus significantly broadened under the Rotterdam Rules as compared to the Hague-Visby Rules. However, the parties to the contract of carriage are afforded, by means of Article 13.3, a possibility to agree on the time and location of receipt and delivery, and thus to opt for a more limited period of responsibility following, for example, the port-to-port rule, a concept introduced by the Hamburg Rules, or to reduce

[211] Article I (e) of the Hague-Visby Rules prescribes: *"'Carriage of goods' covers the period from the time when the goods are loaded on to the time they are discharged from the ship."*

it to the tackle-to-tackle rule. Yet, the parties are virtually prohibited to agree on terms which render the period of responsibility shorter than the tackle-to-tackle concept found in the Hague-Visby Rules. In other words, the proviso in Article 12.3 of the Rotterdam Rules upholds freedom of contract, but this freedom is limited to the extent that the carrier is not allowed to contractually receive the goods after the beginning of their initial loading, and he is not allowed to contractually deliver them before the completion of their final unloading, either. In case the carriage of the goods is multimodal, the terms "initial loading" and "final unloading" refer to the relevant multimodal contract of carriage. However, in cases where the carriage is multimodal but the contract is not, these two terms refer to the loading and unloading of the seagoing vessel under the particular contract of carriage covering the sea leg.[212]

Also, the second paragraph of Article 12 addresses the issue where, after the shipper surrenders the cargo and before the carrier receives it, the goods are, pursuant to the relevant laws or regulations, in the possession of an authority or other third party, who is not an agent of either the shipper or the carrier; as well as where the carrier hands over the goods to an authority or other third party before they are collected by the consignee. This exceptional problem is considered to be typical for port-to-port contracts[213] and Article 12.2 gives a clear-cut solution to that issue by prescribing that, in such a situation, the period of responsibility of the carrier will begin when he collects the goods from that authority or other third party. Likewise, the carrier's period of responsibility will come to an end when he hands the cargo over to that authority or other third party.

In conclusion, the purpose of such a modifiable door-to-door regime, as regards the period of responsibility, was not promoting a fully-fledged multimodal convention but rather creating a maritime regime which reflects the current commercial reality that sea carriage is usually preceded or followed by another mode of transportation.[214] What is more, limiting the scope only to the sea leg was deemed to impede the harmonization and uniformity of transport law.[215]

5.6 Burden of proof

The burden of proof in cargo claims under the Rotterdam Rules is very similar to that under the Hague-Visby Rules.[216] And yet, while the fault-based system of the Hague-Visby Rules was shaped by jurisprudence, the new Convention expressly provides in Article 17 the architecture of the burden of proof, starting with the provision that the initial burden of proof lays on the claimant. Article 17.1 of the Rotterdam Rules states that the *"carrier is liable for loss of or damage to the goods, as well as for delay in*

[212] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – '*The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*', Sweet & Maxwell (2010), ISBN 978-1-84703-734-3, p. 62, para. 4.008.
[213] Francesco Berlingieri – *'A Comparative Analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules'*, a paper delivered at the General Assembly of the AMD in Marrakesh on November 5-6, 2009, p. 6:
http://www.uncitral.org/pdf/english/workinggroups/wg_3/Berlingieri_paper_comparing_RR_Hamb_HVR.pdf
[214] Working Group III (Transport Law), 9th session (New York, 15-26 April 2002) – UNCITRAL Report of the Working Group on Transport Law. See: A A/CN.9/510, para. 28.
[215] (ibid) Working Group III (Transport Law), 9th session (New York, 15-26 April 2002) – UNCITRAL Report of the Working Group on Transport Law. See: A A/CN.9/510, para. 28.
[216] See *Chapter II*, section 4.3(e) *supra*.

delivery, if the claimant proves that the loss, damage, or delay […] took place during the period of the carrier's responsibility". This means that at this initial stage the claimant needs not to establish any breach of the obligations of the carrier. Again, following the Hague-Visby Rules system, the burden of proof shifts on the defendant carrier, who has two alternatives: either to show under Article 17.2 that there is no causal connection between the fault of the carrier or any person for whom he is liable, on the one hand, and the loss, damage or delay, on the other hand (*i.e.* proving absence of fault); or to prove that the loss, damage or delay is attributable to a cause that qualifies for one or more of the excepted perils listed in Article 17.3, which create a presumption that the carrier is not at fault. From that point on, the Rotterdam Rules codify the burden of proof in a more sophisticated manner. The claimant is afforded three alternatives by means of Article 17 paragraphs 4 and 5. He can prove either that the excepted peril was caused by the carrier or by any person for whom the carrier is liable (Article 17.4(a)), or that an event or circumstance not listed as an excepted peril contributed to the loss, damage or delay (Article 17.4(b)),[217] or that the loss, damage or delay was caused by or contributed to by the unseaworthiness of the vessel (Article 17.5(a)).[218] In essence, the Rotterdam Rules follow the Hague-Visby framework and codify the principles that were created and shaped by jurisprudence.

5.7 What lies ahead: prospects of the new Convention to modernize and harmonize the law

The author of this work is far from advocating for the Rotterdam Rules but merely points to the obvious need of modernization of the regulatory framework of shipping. It is difficult to disagree that the Hague and Hague-Visby Rules are brilliantly devised. Their long lifespan are good evidence for their success and an indication that the Rules achieved to a considerable extent their aims – to reach a fair balance of the carrier's and shipper's interests, and to attain a standard set of provisions that are uniformly applied. However, one should not forget the legislative history of the Rules, which was deliberately presented in the beginning of this chapter. The Hague-Visby Rules were released in 1968 but, as discussed, they add very little to the then existing 1924 Hague Rules. The same is true for the 1979 SDR unit Protocol, which is also an amendment bringing little substantial changes. The Hague Rules, on the other hand, were based and heavily relied on the US Harter Act, which was enacted in 1893.[219] This is already as long ago as the end of the 19th century; a time when steamships were still the major vessels in use in the world of shipping.

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[217] In that second scenario, the burden of proof shifts back on the defendant carrier who may try to prove that this event or circumstance is not attributable to his fault or to the fault of any person for whom he is liable.

[218] In the latter scenario, the carrier may, under Article 17.5(b), either prove that there is no causal connection between the unseaworthiness of the vessel and the loss, damage or delay, or prove that he exercised due diligence to make and keep the ship seaworthy.

[219] See *Robert C. Herd & Co. v Krawill Machinery Corp.*, [1959] 1 Lloyd's Rep. 305, at p. 308 and p. 308, fn. 3: *"The legislative history of the [COGSA] Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924, 51 Stat. 233."* […] *"The Hague Rules as amended by the Brussels Convention were, in turn, based in part upon the pioneering Harter Act of 1893, 27 Stat. 445, 46 U.S.C. Sects 190-196. See H. R. Re. No. 2218, 74th Cong., 2d Sess. 7."*

The above sections showed that the Rotterdam Rules offer a more elaborate and comprehensive architecture of the obligations of the carrier. The new Convention is intentionally based on the corresponding provisions of the Hague-Visby Rules, and yet it makes explicit what the Rules leave implicit. This well-calibrated structure of the carriers' cargo-related obligations is devised to reflect modernized shipping practices such as multi-modal carriage in addition to the sea leg, the carriage on free in and out terms, as well as the transportation of containerized cargo and deck cargo. Furthermore, the comprehensive rules set down in the new Convention purport to be capable of ensuring the so needed harmonization and uniformity in the legal framework of international shipping.

Whether these goals will be attained, of course, depends on the international acceptance of the Rotterdam Rules, which are currently far from being ratified by the necessary number of countries that is required in order to trigger their entry into force. The shipping community, however, is not unanimous about the Rotterdam Rules and its impact should they come into force. Numerous shipping countries which operate substantial fleets are concerned that the new Convention puts too much burden on carriers and thus fails to strike a fair balance between the responsibilities of the carrier and the shipper.

One interesting opinion in this regard is that what matters most for any international liability regime is uniformity and not the division of responsibilities in particular:

> *"[I]n the view of the [ICC], uniformity is the one important thing. It does not matter so much precisely where you draw the line dividing the responsibilities of the shipper and his underwriter from the responsibilities of the carrier and his underwriter. The all-important question is that you draw the line somewhere and that that line be drawn in the same place for all countries and for all importers."*[220]

The aim of the Rotterdam Rules is, in essence, to establish a liability regime that is pragmatic enough to facilitate maritime commerce and keep cases away from litigation, and not one that is elegant or simple. The benefit that is brought by greater uniformity was particularly acknowledged by Knud Pontoppidan, the Executive Vice-President of the Danish business conglomerate A.P. Moller-Maersk AS.[221] During a discussion on the final text of the Rules at a CMI conference in October 2008, he noted the greater responsibility imposed on carriers by the Rotterdam Rules as opposed to the Hague-Visby Rules but underlined in the same time that this would be outweighed by the benefits that the carriers will attain by the resulting greater uniformity if the new

[220] *International Convention for the Unification of Certain Rules in Regard to Bills of Lading for the Carriage of Goods by Sea: Hearing on Executive E Before a Subcommittee of the Senate on Foreign Relations*, US Senate, 70th Congress, 1st Session. 3 (1927) (statement of Charles S. Haight, chairman of the ICC, advocating for the US ratification and adoption of the Hague-Rules), reprinted in 3 *'The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules'* (compiled and edited by Michael F. Sturley; 1990) (n 14) at p. 327.

[221] The Group A.P. Moller-Maersk AS has a variety of businesses primarily in the field of transportation, logistics and energy, and is the largest container ship and supply vessel operator in the world as well as an undisputed leader in the international shipping industry.

regime is promptly ratified so that it enters into force.[222] The need of internationally applicable rules is also upheld by the International Chamber of Shipping (ICS) – a globalized industry such as the shipping industry, which is perhaps also the most international one, should be regulated by international rules that are uniformly accepted and implemented so that conflict of laws, litigation and legal costs are reduced.[223]

No one can tell for sure whether one day the Rotterdam Rules will come into force but what lies ahead can be summed up into three alternatives. The first possibility is that the Rotterdam Rules be ratified by the major shipping countries, which will lead not only to their entry into force but also to their acknowledgment as a leading maritime liability regime. This will put an end to the fragmentation of international regimes (*i.e.* the Hague Rules, the Hague-Visby Rules, the Hamburg Rules) and will foster uniformity. The prospects for this possibility seem to be reasonable given the 25 signatory countries, among which there are leading maritime and trading nations, carrier-oriented countries and shipper-oriented countries as well as both developed and developing countries.[224]

Secondly, the new Convention may be ratified by the minimum required number of states, and thus come into force, but without receiving international acknowledgment and support. In this scenario the new Convention will turn into just another liability regime contributing to the further fragmentation of the legal framework regulating the carriage of goods by sea, which will inevitably impair international trade.

The third possibility is that the Rules do not receive the necessary support and ratifications and as a natural result the effort of UNCITRAL and CMI will be wasted, so will be the opportunity to achieve uniformity and modernization in the international transport law governing the carriage of goods by sea. Eminent scholars are of the opinion that should this happen, the *"patchwork system of competing and outdated multilateral conventions"* will continue to exist, partially supplemented by national and regional regimes.[225]

However, in case the Rotterdam Rules are to be rejected by the international community, it is more likely that the *status quo* will not be preserved, for the current leading liability regimes can no longer meet today's needs of the shipping industry. As a result, big shipping nations will be more likely to issue their own domestic legislation which will create a system of regionalism and in the end of the day all parties involved in the process of international carriage of goods by sea will suffer from legal uncertainty, non-uniformity, conflict of rules, and increased legal and administrative costs.

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[222] Knud Pontoppidan – *'Shipowners' View on the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly By Sea'*, CMI YEARBOOK ANNUAIRE 2009, Athens II, Documents of the Conference, p. 282. Retrieved from: http://www.comitemaritime.org/Uploads/Yearbooks/YBK_2009.pdf

[223] *'The Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (The "Rotterdam Rules")'*, a position paper by the ICS. Retrieved from: http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ICS_PositionPaper.pdf

[224] A chronological list of the signatory states and the status of the ratification process of the Convention is available at: http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html

[225] D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'* (2009), Lawtext Publishing limited, Chapter I, p. 2.

Chapter III
The FIOS(T) clause

1. Introduction

Handling cargo claims usually involves accidents that occur at three different locations: at the port of loading, on board the ship, and/or at the port of discharge. While *Chapter II* dealt primarily with obligations related to all three stages, the discussion in *Chapter III* will come down to the particular moment of loading, stowing, and discharging the cargo. More specifically, it will deal with the problems occurring as a result of the tension between the Hague-Visby Rules, on the one hand, and the transfer of the duty to load, stow, trim and discharge the cargo, on the other hand. Such a contractual arrangement is normally carried out through the so-called FIOS clause, which has been turned by the English jurisprudence into one of the permissible exceptions to the Rules. Not all jurisdictions, however, share the same view towards the contractual delegation of the obligations set forth in Art. III rule 2 HVR. That is why a concise review will be made of the position under Dutch, French and US law with regard to the nature and applicability of the FIOS(T) clause.

An extensive study will be carried out of pivotal English cases in order to explore and define the limits of the carrier's responsibility over the cargo when his obligations to load, stow and discharge have been contracted out. However, it is relevant to point out that while a FIOS clause, or any of its variants,[1] transfers the responsibility for loading, stowing and discharging to the charterer, shipper and/or consignee, the carrier is still under certain cargo-related obligations such as to avoid damage to other cargo on board the ship during the loading or discharging processes as well as to care for the cargo during the voyage.[2]

Lastly, the current Chapter will also explore the new approach towards free-in-and-out arrangements adopted in the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules). A recourse will be made to the *travaux préparatoires*, where necessary, in order to establish the considerations of the drafters during the negotiations within the Working Group with regard to reaching the goals of achieving uniformity and modernization, taking into account current shipping practices.

[1] FILO, FILTD, FIO, FIOST, FIOT, FIS, FISLO, LIFO, *etc.* See section 2 *infra.*
[2] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), ISBN: 978-2-89635-126-8, Vol. 1, p. 661.

2. Shipping Terms

The expression FIOS, which means Free In and Out Stowed, as well as its variations (*e.g.* FIO, FILO, FIOT and FIOST), signifies who will be responsible for paying for and for performing the processes of loading, stowing, trimming, and discharging the cargo. FIOS clauses are inserted in charter parties or in bills of lading contracts of carriage to specify that the charterer in a charter party agreement, or the cargo owner in a bills of lading contract of carriage, is to carry out some or all of the cargo-related obligations: loading, stowing, trimming and discharging of the goods. In other words, the carrier is rendered contractually free from these obligations and is not bound to carry them out.

The phrasing of the clause is always read from the perspective of the carrier and, therefore, the word "free" means free of charge for the carrier. Accordingly, FIO terms (Free In and Out) means that the carrier's ordinary responsibility to load and discharge the cargo will be transferred to the charterer, the shipper and/or the consignee, depending on the specific case. Put another way, a shipowner under FIO terms will not pay for the expenses at the loading port ("in") and at the discharge port ("out"). Conversely, where the shipowner pays for loading and discharge, this is known as *liner terms*, or *gross terms*, and these two shipping terms signify that the freight, which is paid to the shipowner, is inclusive of carriage and of the cost of cargo handling at both the loading and discharge ports. A similar term is FIS (Free In and Stowed) where, however, only loading and stowing are free of charge for the carrier and are to be performed by the charterer and/or shipper while the duty to unload stays with the carrier.

FILO (Free In Liner Out), also known as FILTD (Free In Liner Terms Discharge), absolves the carrier only from the responsibility to load the cargo, whereas he will still be under the obligation to take the cargo "out" of the vessel, namely to discharge it. Hence, the freight is inclusive of carriage and the cost for the discharge of cargo but, unlike liner terms, it does not include the cost of loading ("free in"). The LIFO (Liner In Free Out) term works in a reverse way – the carrier will be free from the responsibility to discharge the cargo but he will still have to load it. In this case the freight is inclusive of carriage and the cost for the loading of the cargo but does not include the cost of discharge, which have to be borne by the charterer, shipper or consignee.

Yet another variation is the FISLO (Free In Stowed Liner Out), where the shipper or charterer is required to load and stow the cargo at their own expense while the cost for the discharge will be paid for by the carrier. That is, the ocean freight will include the cost of cargo discharge but not of loading and stowing.

Furthermore, the FIOT (Free In and Out Trimmed) term will transfer the responsibility with regard to loading, trimming and discharge; whereas FIOST terms (Free In and Out Stowed and Trimmed) requires the charterer, shipper or consignee to pay for loading, stowing, trimming and discharging the cargo. Consequently, all these operations will be carried free of expense to the shipowner and are not included in the ocean freight. Another variant is FIOL (Free In and Out Lashed).

Whereas FIOS(T) will usually apply to bulk cargo, the term FIOSLSD (Free In and Out Stowed, Lashed, Secured and Dunnaged) is used with respect to general cargo. Similarly, this term transfers the costs for loading, stowing and discharge as per FIOS but it also transfers the cost of lashing, securing and dunnaging cargo to the cargo interests or charterers.

These commercial shipping terms derive from charter party agreements but nowadays they may well be found in bills of lading contracts, too. If this clause is found in a charter party agreement, the specified cargo-related obligations, as stipulated by the particular shipping term, will be transferred from the shipowner to the charterer. In general, it is in the interest of the shipowners to fix their ships on FIO(S)(T) terms so that they will not bear stevedoring costs for loading or discharging and/or other relevant cargo-related duties. Fixtures on these terms favour shipowners also in a sense that the latter will not have to worry about a possible rise in the charge of the stevedoring company given the fact that loading and discharging costs may vary from port to port.

On the other hand, when one of these terms (FIO, FILO, FIOST) is laid down in the bills of lading, the cost and responsibility for these operations will be transferred from the carrier to the cargo interests (the shipper and/or consignee).

3. The tension between the Hague-Visby Rules and the FIOS(T) clause

Before diving headfirst into the debate over the validity of FIOS(T) clauses in bills of lading[3], it is important to note that the transfer of the carrier's duties to load, stow and/or discharge the cargo consists of three separate limbs. The first one is the transfer of the responsibility to actually carry out the tasks envisaged in the FIOS(T) clause; the second one is the transfer of the responsibility to pay for these tasks at the port of loading and/or discharge; and the third one is the transfer of responsibility over the goods should they be damaged during loading or discharge, namely the transfer of liability. Thus, for example, as von Ziegler points out, a FIOS clause which provides strictly for financial matters, namely what is inclusive of the freight, will not impact on the carrier's basic and fundamental obligation to load, stow and discharge the goods; let alone will such a FIOS arrangement have any effect resulting in the transfer of the carrier's liability (the third limb).[4] The same observation was expressed by the Court of Appeal in *The "Jordan II"* where it was reminded that the word "free" means free of expense and, although some FIOS(T) clauses transfer to charterers also the responsibility and liability, the inclusion of the acronym by itself does not always amount to a transfer of these cargo-related operations.[5] Therefore, clear words should be used that refer to both cost and risk so that the clause can effectively transfer responsibility for the respective cargo operations.

[3] For the transfer of these duties under a charter party, see *Chapter II*, section 4.4.1 *supra* and *Chapter III*, section 4.7 *infra*.
[4] Alexander von Ziegler – *'The Liability of the Contracting Carrier'*, The Texas International Law Journal, Vol. 44, No 3 (Spring 2009), p. 329.
[5] *Jindal Iron and Steel Co. Ltd. and Others v Islamic Solidarity Shipping Co Jordan Ltd. (The "Jordan II")* – Court of Appeal (Waller LJ, Tuckey LJ, Black J) – Lloyd's Law Reports [2003], Vol. 2, p. 87 at p. 103.

Contractual arrangements on FIOS terms are typically found in tramp and bulk carriage that are arranged through charter parties, under which bills of lading are issued. In this case, if the FIOS(T) clause is duly incorporated in the bill of lading, it is the shipper who performs loading of the vessel and it is the consignee who carries out the discharge, whereas the carrier is not involved in these operations. By transferring the duties to load and discharge the cargo, the free in/free out terms give rise to a difficult problem with regard to who is the responsible party for damaged goods upon loading or discharge. On the one hand, arguing that the FIOS(T) clause is not valid and that the carrier is still responsible for the goods during these stages, would be contrary to what parties have agreed; equally important is that the carrier would be thus responsible for the actions or omissions of other parties. Another argument promoting the validity of FIOS clauses is that the strict prohibition of the carrier contracting out his obligation to load, stow and/or discharge will render the defence in the Hague Rules Article IV(2)(q) meaningless.[6]

On the other hand, ruling out that a carrier under FIOS terms is not responsible for damage that occurred during loading or discharge may conflict Article III rule 8 of the Hague-Visby Rules. Under that provision, the FIOS clause will be null and void if it is interpreted as a clause that lessens carrier's liability otherwise than as provided in the Rules, by relieving the carrier from the (allegedly non-delegable) duty to properly and carefully load, stow and discharge the cargo as required by Article III rule 2.

Therefore, the solution to the problem with the validity of a free in/free out arrangement comes down to the question whether the duty in Article III(2) is delegable or not. In case it is not, then a FIOS clause would be considered as a clause that relieves the carrier of liability for performing a duty set forth in the Rules and, therefore, the clause shall be invalidated by Article III rule 8. Alternatively, if the carrier's obligation to load, stow and discharge the cargo is interpreted as one that can be lawfully transferred to another party, then the free in/free out terms represent a lawful contractual arrangement and are not rendered null and void by the relevant provision of the Hague-Visby Rules.

Although acceptable in charter party contracts, the FIOS clause inserted in a bill of lading contract is a subject of significant disagreement among scholars, in particular whether a carrier can avoid liability for cargo damaged during loading, stowing and/or discharging where a party other than the carrier or his agents or employees has undertaken the responsibility to perform these tasks. Eminent commentators such as Professor William Tetley assert that such clauses, when inserted in a bill of lading, *"upset the balance in the Hague and Hague-Visby Rules between the interests of shippers and carriers"*.[7] Conversely, other authors uphold that a shipper cannot sue for cargo

[6] This argument was raised in the US case *Sumitomo Corp. of America v. M/V Sie Kim*. The District Court went further and adduced the extreme argument that since the bill of lading specifies that loading and stowage are not performed by the carrier, then the bill will not regulate the relations between the carrier and the shipper during this stage. Hence, following COGSA's provision which embodies the definition in Article I (b) of the Hague Rules, loading and stowage will not be part of the "contract of carriage" and, therefore, COGSA should not be applicable between the carrier and the shipper, allowing the former to contract out its liability for loading and stowage.

[7] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), ISBN: 978-2-89635-126-8, Vol. 1, Chapter 24, p. 1260.

damage caused by his own negligence upon loading and/or stowing when he assumes the responsibility to load and/or stow and actually does that.[8]

English jurisprudence has answered in the affirmative the question whether a carrier can validly transfer the obligation to properly and carefully load and stow the cargo pursuant to Article III rule 2 of the Hague-Visby Rules. This view was first expressed by Devlin J in *"Pyrene v Scindia"*, and was later reaffirmed in the House of Lord cases *"Renton v Palmyra"* and *The "Jordan II"* as well as in other English cases that will be thoroughly studied below. The English approach has been adopted in other Commonwealth countries such as Australia, New Zealand, India and Pakistan.[9]

Yet, there are numerous other legal systems which reject the transferrable character of the obligation to properly and carefully load, stow and discharge the cargo such as France and South Africa.[10] For example, under French law a FIOS clause is interpreted as a financial clause, which does not modify other responsibility clauses in the contract or the imperative rules of Article 3 rule 2 of the Hague/Hague-Visby Rules.[11] This means that the clause merely allocates the expenses for loading, stowing and/or unloading. It is still the carrier or its sub-contractors who shall load, stow and/or unload but the ocean freight, payable by the shipper to the carrier, will not be inclusive of the cost for performing these operations. Instead, the shipper will pay separately for these specific services. In this case, if damage occurs upon loading, stowing, and /or stowing, or in case these obligations are not performed properly and carefully so that cargo is damaged *en route* as a result thereof, it will be the carrier who will be held responsible and eventually liable for the damage to the cargo.

Somewhere in between is the view taken by the United States, where there is a debate whether this obligation is delegable. For example, in the cases *Sumitomo*[12], *Atlas*[13], and *Sigri*[14], the Court held that the carrier is allowed to contract out his liability for improper loading and stowage under a FIO agreement on condition that: the damage is caused by the shipper's stevedores; and the carrier does not supervise, nor play any role in these processes, where the absence of the carrier's active role or supervision is a critical factor for shifting the risk and liability for damaged cargo to the shipper. In other cases, however, the US Court of Appeal has ruled that the carrier's duty to properly and carefully load and stow is non-delegable regardless of which party actually performed these tasks.[15] Perhaps the most explicit example of the disagreement in the US

[8] Benedict on Admiralty, Michael Sturley et al, 7th ed., Matthew Bender, 1993, §94.
[9] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), ISBN: 978-2-89635-126-8, Vol. 1, Chapter 24, p. 1256.
[10] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), ISBN: 978-2-89635-126-8, Vol. 1, Chapter 25, pp. 1297-1300.
[11] Anne-Laurence Michel – *'La Portée de la Clause F.I.O./F.I.O.S/ F.I.O.S.T dans l'affrètement au Voyage'*, 597 Droit Maritime Français, Octobre 1999, p. 799.
[12] *Sumitomo Corp. of America v. M/V Sie Kim*, 632 F.Supp. 824 (1985), United States District Court, S.D. New York, August 27, 1985.
[13] *Atlas Assurance Co. v. Harper, Robinson Shipping Co.*, 508 F.2d 1381 (1975), United States Court of Appeals, Ninth Circuit. January 7, 1975.
[14] *Sigri Carbon Corp. v. Lykes Bros. Steamship Co.*, 655 F.Supp. 1435 (1987), United States District Court, W.D. of Kentucky, Paducah Division, March 24, 1987.
[15] See: *Demsey & Associates, Inc. v. S/S Sea Star*, 461 F.2d 1009 (1972), United States Court of Appeals, Second Circuit. Argued January 11, 1972. Decided May 16, 1972.; and *Nichimen Co. v. M/V Farland*, 462 F.2d 319 (1972), United States Court of Appeals, Second Circuit. Argued April 12, 1972. Decided May 12, 1972.

regarding whether the carrier may escape liability by means of a FIOS clause is the case *Associated Metals & Minerals Corp. v. M/V Arktis Sky*.[16] The US District Court first granted a summary judgment that the carrier is entitled to the effect of the FIOS clause, but then the US Court of Appeal reversed the decision and held that a FIOS agreement is null and void under the relevant COGSA provision which embodies Article III(8) of the Hague Rules.[17]

Dutch legal literature is divided in its stance on the tension between a FIOS(T) clause and the mandatory application of Article III rule 2. Some authors are proponents of the conception that carriers are always subject to the explicit requirement to properly and carefully load, stow and unload the cargo related to the even more explicit provision in Article III rule 8, which provides that any contractual relief or lessening of a carrier's liability or duties or obligations as stated in the Rules shall be null and void.[18] In the opinion of S. Royer, while shippers admittedly may benefit from performing loading, stowing and discharge themselves, in the sense that the shipper's expert handling may minimize the chance of damaging the cargo, the carrier will nevertheless remain liable for any damage that took place during these operations.[19] Similarly, H. Schadee

[16] *Associated Metals & Minerals Corp. v. M/V Arktis Sky*, 978 F.2d 47 (1992), United States Court of Appeals, Second Circuit. Argued June 4, 1992. Decided October 1, 1992.

[17] Mark Hegarty – *'A COGSA Carrier's Duty to Load and Stow Cargo is Non-delegable, or Is It?: Associated Metals & Minerals Corp. v. M/V Arktis Sky'*, Tulane Maritime Law Journal, Vol. 18, No 1 (Winter 1993), p. 125.

[18] Sjoerd Royer – 'Hoofdzaken der vervoerdersaansprakelijkheid in het zeerecht', Zwolle : Tjeenk Willink, 1959, p. 431: *"Het is dan ook allerminst in strijd met de billijkheid, dat de afzender zich met het inladen belast; wel zou het daarentegen onbillijk zijn om de vervoerder aansprakelijkheid te houden op grond van onbehoorlijk en onzorgvuldig laden, stuwen en lossen, terwijl in feite de afzender het laden heeft verricht en daarbij niet behoorlijk en zorgvuldig te werk is gegaan. Niettemin brengt de strenge leer deze consequentie met zich mede. Immers, indien de afzender de goederen inlaadt en daarbij schade veroorzaakt, is de vervoerder krachtens deze leer in ieder geval aansprakelijk, aangezien hij zich niet aan het voorschrift van art.III lid 2 heeft gehouden."* [Sjoerd Royer – 'Main points of the carrier's liability in maritime law', Zwolle : Tjeenk Willink, 1959, p. 431: *"It is, therefore, not at all contrary to fairness if the shipper is responsible for loading; on the other hand, it would be unfair if the carrier is held liable based on improper and careless loading, stowage and discharge, while in fact it is the shipper who has performed the loading and has not, thereby, properly and carefully proceeded with the tasks. Nevertheless, the strict doctrine involves these consequences. After all, if the shipper loads the goods and causes damage thereby, under this doctrine it is the carrier who is in any case liable since he has not complied with the provision of Art.III rule 2."*]

[19] Sjoerd Royer – 'Hoofdzaken der vervoerdersaansprakelijkheid in het zeerecht', Zwolle : Tjeenk Willink, 1959, p. 430: *"In sommige gevallen worden clausules, waarbij de afzender op zich neemt om te laden en te stuwen en de ontvanger om te lossen, juist door deze personen noodzakelijk geacht; indien het namelijk goederen betreft, die door hun bijzondere aard deskundige behandeling vereisen, zal de ladingbelanghebbende zich veel liever zelf met het uitvoeren der betrokken verrichtingen belasten dan dit overlaten aan de terzake niet, althans minder deskundige vervoerder, waarbij immers een veel groter kans op het ontstaan van schade aanwezig is. Weliswaar zal de vervoerder voor deze schade aansprakelijk zijn, doch een ladingbelanghebbende, die de keus heeft tussenschadevergoeding en onbeschadigde aflevering der goederen, zal over het algemeen uiteraard de voorkeur hechten aan dit laatste, ook al brengt zulks met zich mede, dat hij zelf voor het laden, stuwen en lossen zorg zal hebben te dragen."* [Sjoerd Royer – 'Main points of the carrier's liability in maritime law', Zwolle : Tjeenk Willink, 1959, p. 430: *"In some instances, clauses under which the shipper undertakes to load and stow and the receiver to discharge, are considered necessary particularly by these parties; in case this actually concerns goods that require expert handling because of their particular nature, then the cargo interests would prefer to take care of the handling operations themselves than to leave those to the, at this point, not or at least less experienced carrier, which will result in a much greater chance of damage to the cargo. Indeed the carrier will be liable for this damage, but the cargo interests who have the choice between compensation or undamaged delivery of the goods, will generally speaking prefer the last option of course, even if they themselves must take care of loading, stowage and discharge."*]

expresses his concerns that a desirable and justifiable clause such as FIOS(T) goes against the explicit provisions of the Hague-Visby Rules.[20]

Yet, other Dutch authors point out that a FIOS(T) clause is not limited to a fee clause but relates also to the responsibility to properly and carefully load, stow and unload the cargo.[21] In the opinion of H. Boonk, Article III rule 2 HVR requires the carrier to properly and carefully perform these operations only when he undertook to do so. Accordingly, when it is the carrier who actually performed these cargo-related tasks, a FIOS(T) clause cannot absolve him from responsibility.[22]

Although one could hardly find a consensus between the opinions of Dutch legal scholars, it is submitted that the Supreme Court of the Netherlands (SCN) has taken a rather reasonable view towards upholding this existing commercial practice, on the one hand, and protecting the interests of prudent cargo owners.[23]

In the case *De Favoriet*,[24] the Dutch Supreme Court had to decide on the validity of a FIO clause in relation to the consignment of cargo of onion shipped from Alexandria, Egypt to London on the Dutch vessel *De Favoriet*. The cargo was loaded and stowed by the shipper who was also the charterer of the vessel, whereas the damage was found by the receiver (the B/L holder) who sued the carrier under the bill of lading. The Hague Rules were applicable to the case. The issue that came before the Supreme Court was whether the carrier could rely on the FIO clause against the bill of lading holder. The judges ruled that the carrier could transfer the responsibility to load, stow and unload to the shipper and rely on Article IV rule 2(i) and (q) but, in order to use the clause as a defence against a third party B/L holder, it was necessary for the carrier to prove that the B/L holder was aware that loading, stowing and unloading were performed by the sender, may that be the charterer or shipper, or other persons not employed by the carrier.[25] This ruling has been positively welcomed by Dutch authors because of, first,

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[20] H. Schadee – *'Het Nieuwste Zeerecht'*, Voordracht voor de leden der Nederlandsche Vereeniging voor Zeerecht te Amsterdam gehouden op 7.I.1956, Koninklijke Nederlandsche Reedersvereeniging, p.18: *"Ik vrees, dat onder vigueur van ons nieuwste zeerecht dergelijke op zichzelf zeer wenselijke en gerechtvaardigde ontheffingsclausules [als FIOS] nietig zullen blijken te zijn. Art. 468-2 [Art.III(2) HVR] bepaalt uitdrukkelijk, dat de vervoerder verplicht is zorg te dragen voor goede stuwage en art. 468-9 [Art.III(8) HVR] even uitdrukkelijk, dat hij zich niet kan ontheffen van aansprakelijkheid voor schade voortvloeiende uit nalatigheid in het voldoen van deze verplichting."* [H. Schadee – *'The Newest Maritime Law'*, Speech for the members of the Dutch Association for Maritime Law held in Amsterdam on 7.I.1956, Koninklijke Nederlandsche Reedersvereeniging, p.18: *"I am afraid that under our newest maritime law, such exemption clauses that are in and out themselves very desirable and justified [as FIOS] will turn out to be null and void. Art. 468-2 [Art.III(2) HVR] expressly provides that the carrier is required to ensure proper stowage and art. 468-9 [Art.III(8) HVR) also expressly states that he cannot be exempted from liability for damages resulting from failure to comply with this obligation.*]

[21] H. Boonk – 'Zeevervoer onder cognossement', Gouda Quint BV, Arnhem (1993), p. 190.

[22] H. Boonk – 'Zeevervoer onder cognossement', Gouda Quint BV, Arnhem (1993), p. 191: *"Voor zover ondanks een FIOS-beding de inlading, lossing en/of stuwage daadwerkelijk geschieden door de vervoerder of diens hulppersonen, kan de vervoerder zich in verband met art. 381 lid 2 niet vrijtekenen voor de uitvoering van die werkzaamheden gemaakte fouten."* [H. Boonk – 'Sea transport under bills of lading', Gouda Quint BV, Arnhem (1993), p. 191: *"To the extent that, despite a FIOS clause, a carrier or his agents actually carries out loading, discharge and/or stowage, in view of art. 381 rule 2 the carrier cannot be exonerated for the faults that were made during performing these activities."*]

[23] N.J. Margetson – *'Liability of the Carrier Under the Hague (Visby) Rules for Cargo Damage Caused by Unseaworthiness of Its Containers'*, (2008) 14 JIML 153, at p. 158.

[24] *De Favoriet*, SCN 19 January 1968, NJ 1968, 20; Schip en Schade [1968], p.51 No.19-20.

[25] *De Favoriet*, SCN 19 January 1968, NJ 1968, 20; Schip en Schade [1968], No. 20, pp. 51-53, at p. 52: *"...voor het slagen van dat beroep niet, althans niet zonder meer en in alle omstandigheden, vereist is, dat de vervoerder stelt en/of te bewijzen aanbiedt, resp. bewijst, dat het aan de cognossementshouder bekend was,*

acknowledging an existing practice facilitating international trade and, second, affording sufficient protection to third party B/L holders.[26]

The more recent case *De Atlantic Coast*,[27] held before the Court in Rotterdam, summarizes and confirms the Dutch law position towards FIOS(T) clauses. The case concerned a carriage of rice under a bill of lading from Nieuw Nickerie (Suriname) and Georgetown (Guyana) to Rotterdam. The plaintiff cargo interests claimed that the FIOST clause related only to the transfer of costs related to loading, stowing and unloading. Defendants, on the other hand claimed that the clause transferred to the cargo interests not only the cost but also the risk for those operations. The Court ruled, *inter alia*, that a FIOST clause relates to both costs and risks with regard to loading, stowing and discharging of cargo.[28]

Although it is observable that the Dutch and the English stance on the validity of a FIOS(T) clause are very similar,[29] other jurisdictions interpret differently the application of such a clause within the context of the Hague-Visby Rules. To sum up, it is perhaps fair to outline Lord Steyn's observation that there is no dominant view on an international level with regard to whether the carrier's duty to load, stow and discharge is delegable or non-delegable since the opinion in foreign jurisdictions is evenly divided.[30]

4. English jurisprudence on the FIOS clause: defining the limits of the carrier's responsibilities over the cargo

There are several English decisions that give a conclusive answer to the question whether a carrier can transfer under a bill of lading the obligation to load, stow and discharge as well as the responsibility for the performance of these operations. What is more, through the common law principle of *stare decisis*[31] (to stand on decided cases) the

dat de belading en/of de stuwage is geschied door de afzender, casu quo bevrachter, resp. dat de goederen zijn geladen en gestuwd door personen niet in dienst van, ondergeschikt aan of werkende voor rekening van de vervoerder;". [*De Favoriet*, SCN 19 January 1968, NJ 1968, 20; Schip en Schade [1968], No. 20, pp. 51-53, at p. 52: *"…for the success of this action it is not, at least not without question and in all circumstances, required that the carrier states and/or offers to prove, respectively proves, that the bill of lading holder was aware of the fact that the loading and/or stowage was performed by the shipper, casu quo the charterer, respectively that the goods were loaded and stowed by parties who are not agents, subsidiaries or employees of the carrier."*]

[26] M.L. Hendrikse, N.H. Margetson, N.J. Margetson – *'Aspects of Maritime Law: Claims under Bills of Lading'*, Kluwer Law International (2008), ISBN 13: 9789041126238, p. 80.

[27] *De Atlantic Coast*, Rb. Rotterdam 16 februari 1990, Schip en Schade [1991], Nr. 15, p. 34.

[28] *De Atlantic Coast*, Rb. Rotterdam 16 februari 1990, Schip en Schade [1991], Nr. 15, pp. 34-36 at p. 35: *"De Rechtbank is van oordeel dat de FIOST-clausule behalve een kostenbeding tevens een risico-beding is. Dit is vaste rechtspraak hier te lande. Blijkens de bewoordingen van het beding ("free in and out stowed") beoogt de clausule vrijtekening van de vervoerdersaansprakelijkheid volgens de Hague Rules zowel bij belading en stuwage als bij lossing."* [*De Atlantic Coast*, Rb. Rotterdam 16 februari 1990, Schip en Schade [1991], Nr. 15, pp. 34-36 at p. 35: *"The Court finds that the FIOST clause, besides being a cost-related clause, also is a risk-related clause. This is settled case law in this country. It is apparent from the wording of the clause ("free in and out stowed") that the clause is deemed as an exemption for the carrier from liability under the Hague Rules with regard to both loading and stowage, and discharge."*]

[29] H.S. van Overklift – *'De FIOS-clausule in rechtsvergelijkend perspectief'*, Tijdschrift Vervoer & Recht (TVR), maart 2005 – afl. 2, p. 35.

[30] *Jindal Iron and Steel Co. Ltd. and Others v Islamic Solidarity Shipping Co Jordan Ltd. (The "Jordan II")* – Lloyd's Law Reports [2005], Vol. 1, p. 57, at p. 65.

[31] Under this common law principle, which distinguishes common law systems from civil law systems, new cases are decided with reference to former decisions or precedents in cases with similar facts. Although it is

Court gradually defined the limits of the cargo-related responsibilities of the carrier. It was first Devlin J who provided in *"Pyrene v Scindia"* a purposive interpretation of Article III rule 2 of the Hague Rules which requires the carrier to *"properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried"*. His view, albeit *obiter dicta*, was reaffirmed and relied on in numerous subsequent cases. Only three years later, it laid the foundations of the reasoning in *"Renton v Palmyra"* where the House of Lords upheld contractual freedom regarding the scope of the carrier's responsibilities over the cargo, and held that Article III rule 2 of the Hague Rules does not impose an obligation upon the carrier but instead specifies the terms on which the service should be performed. These decisions are closely related to the validity of the FIOS(T) clause which, under a bill of lading, purports to transfer the responsibility of loading, stowing and trimming to the shipper, and of discharging to the receiver of the cargo. Such a clause was the central issue in the more recent case *The "Jordan II"*, where the House of Lords definitively approved contractual arrangements on FIOS terms. Furthermore, the decision in the more recent case *The "Eems Solar"* elaborated and extended the scope of application of a FIOS clause laid down in a charter party agreement and incorporated in a bill of lading.

Legal disputes that involve FIOS(T) arrangements in tramp shipping will also be considered because contracting out some of the carrier's cargo-related obligations through a free-in-free-out clause is typical for bulk cargo carriage under a charter party. Conversely, in liner trade it is usually the carrier who is responsible for loading, handling, stowing and discharging the cargo. This is especially the case for containerized cargo. Nevertheless, there are sometimes situations where FIOS(T) arrangements are agreed between parties in liner trade as well, usually with respect to project cargo or special or particular goods, regardless whether the bill of lading refers to the provisions of a charter party or not.

4.1 Opening the door to FIOS(T) clauses

The pivotal case *"Pyrene Company Ltd. v. Scindia Steam Navigation Company Ltd."* was already discussed in *Chapter II* in the light of the meaning of the phrase *"properly and carefully"*[32] and also with regard to the interpretation of the Hague-Visby Rules' Article I (e) on the period of responsibility of the carrier.[33] Having made the stipulation that the *"Pyrene v Scindia"* case has several aspects (privity of contract, limitation of liability, period of application of the Hague Rules, varieties of FOB contracts), we will now focus particularly on Devlin J's *dictum* with respect to the transfer of responsibility for loading.

On the facts, the plaintiffs Pyrene contracted on "FOB terms London" for the sale of six fire tenders to the Indian Government, the buyers and shippers of the cargo. Accordingly, the buyers made all the arrangements for the carriage of the fire tenders by entering into a contract of carriage with the shipowners Scindia and nominating Scindia's steamship *Jal-Azad* as the carrying vessel. Pyrene, following the instructions of

not always strictly applied, it provides for a predictable resolution of cases and for maintaining stability and uniformity in the application of the law.

[32] See *Chapter II*, section 4.3(a).

[33] See *Chapter II*, section 4.3(d).

the buyers, delivered the cargo at the London docks, and then it was put onto lighters for shipment on *Jal-Azad*. While one of the tenders was being lifted by the ship's tackle, and before it crossed the ship's rail, it was dropped and damaged due to the negligence of the shipowners – Scindia. The fire tender never crossed the ship's rail but, instead, was removed for repairs carried out by the seller Pyrene, and then it was shipped to India at a later stage. The repairing costs amounted to £966 and were claimed against Scindia. The defendant shipowners admitted the negligence of their stevedores, and also argued that the property and risk remained with the sellers when the damage occurred. However, the main issue that arose was on the amount of damages. The defendants claimed that they were entitled to the defences provided by Article IV rule 5 of the Schedule to COGSA 1924, which limited their liability to £200. Conversely, the plaintiffs claimed the full amount and argued that the COGSA did not apply since the damage took place before the fire tender passed the ship's rail, and also that the fire tender was deleted from the bill of lading before the bill was signed. Moreover, the sellers sued in tort in order to avoid the Hague Rules package limitation, and argued that they were not a party to the contract of carriage. Thus, the core of the case comes down to the applicability of the Hague Rules to an FOB seller.

Devlin J interpreted Articles I (b), I (e), II, III (2), and IV (5) of the Hague Rules to conclude that the plaintiffs were bound by the Hague Rules package limitation and also that they were in an implied contract of carriage with the carrier. Of particular interest for the legality of FIOS clauses is Devlin J's construction of Article III rule 2. He justified the contractual delegation of the duty to load with the following arguments already pointed out in *Chapter II*:

> *The phrase "shall properly and carefully load" may mean that the carrier shall load and that he shall do it properly and carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation perhaps fits the language more closely, but the latter may be more consistent with the object of the Rules. Their object […] is to define not the scope of the contract service but the terms on which that service is to be performed.[…] It is difficult to believe that the Rules were intended to impose a universal rigidity in this respect, or to deny freedom of contract to the carrier. […] But I see no reason why the Rules should not leave the parties free to determine by their own contract the part which each has to play. On this view the whole contract of carriage is subject to the Rules, but the extent to which loading and discharging are brought within the carrier's obligations is left to the parties themselves to decide.* [34]

Although Devlin J allowed the possibility of a literal interpretation of this particular provision of the Rules, he stressed on the fact that this would lead to absurd results.[35] Instead, he adhered to a purposive reading of Article III rule 2 and upheld freedom of contract with regard to loading, stowing and discharging. This statement was in *obiter dictum* but nevertheless it was relied on in many subsequent cases and its importance can be evidenced by the words of Lord Steyn in *The "Jordan II"*, who

[34] *Pyrene Company Ltd. v Scindia Steam Navigation Company Ltd.* – Queen's Bench Division (Devlin J) – Lloyd's List Law Reports [1954] Vol. 1, p. 321 at pp. 328-329.
[35] *Ibid.*, p.329.

qualifies it as *"a carefully considered statement by one of the most distinguished commercial judges of the 20th century".*[36] The effect of this interpretation is that Article III rule 2 of the Hague Rules does not impose upon the carrier an obligation to load, stow and discharge the goods properly and carefully, but it obliges the latter to perform these cargo operations so only when he has agreed and contracted to carry them out. This pivotal decision functions, thus, as an early herald that opened the door to the acceptability of FIOS(T) clauses.

The approach established in *"Pyrene v Scindia"* with regard to transferring the obligation of the carrier to properly and carefully load, stow and discharge the cargo was confirmed two years later in the House of Lords case *"G. H. Renton & Co. Ltd. v Palmyra Trading Corporation." (The "Caspiana").*[37] Although that case did not refer to a FIOS(T) clause *per se* but to a clause which permitted cargo to be discharged at a port alternative to the contractual one in an event of a strike, its decision has a direct relevance to the admissibility of FIOS(T) clauses.

The plaintiffs Renton, timber importers, contracted with the defendants Palmyra Trading Corporation, of Panama, for the carriage of lumber on Palmyra's steamship *The Caspiana* from the Canadian ports of Vancouver and Nanaimo in British Columbia to London and Hull. The bill of lading contained a clause with two contentious provisions, one of which allowed the carrier to discharge the cargo at the port of loading or any other safe and convenient port in case of difficulties which could prevent loading or discharging such as, *inter alia*, strikes; whereas the other provision stipulated that all extra expenses incurred thereto would be borne by the merchant:

> *14. Government Directions, War, Epidemics, Ice, Strikes, etc.*
>
> *. . .*
>
> *(c) Should it appear that epidemics, quarantine, ice, – labour troubles, labour obstructions, strikes, lockouts, any of which on board or on shore – difficulties in loading or discharging would prevent the vessel from leaving the port of loading or reaching or entering the port of discharge or there discharging in the usual manner and leaving again, all of which safely and without delay, the master may discharge the cargo at port of loading or any other safe and convenient port.*
>
> *. . .*
>
> *(f) The discharge of any cargo under the provisions of this clause shall be deemed due fulfillment of the contract. If in connection with the exercise of any liberty under this clause any extra expenses are incurred, they shall be paid by the merchant in addition to the freight, together with return freight if any and a reasonable compensation for any extra services rendered to the goods.*

The vessel loaded timber under four bills of lading, three of which were governed by the Hague Rules, while the fourth covered on-deck cargo and, hence, stayed outside

[36] *Jindal Iron and Steel Co. Ltd. and Others v Islamic Solidarity Shipping Co Jordan Ltd. (The "Jordan II")* – Lloyd's Law Reports [2005], Vol. 1, p. 57, at p. 62.
[37] *G.H. Renton & Co. Ltd. v Palmyra Trading Corporation of Panama (The "Caspiana")* – House of Lords (Viscount Kilmuir, Lord Morton of Henryton, Lord Tucker, Lord Cohen and Lord Somervell of Harrow) – Lloyd's Law Reports [1956] Vol 2, p. 379.

the ambit of the Rules.[38] During the contractual voyage, after the vessel passed through the Panama Canal, a strike broke out in London, which later spread to neighbouring British ports including Hull, whereas stevedores in many other UK ports, as well as continental ports, were reluctant to discharge cargo which had been originally destined to the port of destination of *The Caspiana*. In accordance with Clause 14 (c) and (f), the carrier discharged the cargo in Hamburg which was admitted to be a safe and convenient port for the shipowners. Alleging that they have duly performed the contract of carriage, the carriers did not take any steps to forward the cargo from Hamburg to London and Hull, respectively, nor did they pay the cost for storage the timber in Hamburg or for the trans-shipment to London and Hull.

The plaintiff cargo owners claimed damages and contended that the carrier failed to deliver the goods to the port of destination. In particular, Renton raised three arguments, one of which was that under Article III rule 2 of the Hague Rules – which requires the carrier to *"properly and carefully […] carry […] and discharge the goods"* – the defendants were obliged to discharge at the proper port, and any clause permitting deviation from this obligation was rendered null and void under Article III rule 8 of the Rules.

On first instance McNair J. held, among other things, that the words *"discharge the goods carried"* within the meaning of Article III rule 2 meant discharge at the proper port, which in this case would mean the ports of London or Hull. Therefore, in his opinion, Clause 14, which allowed the master to discharge at Hamburg, relieved the carrier from their obligation under Article III rule 2. As a result, the clause was rendered null and void and, accordingly, the defendants were liable to the plaintiffs.

However, the Court of Appeal reversed the judgment of McNair J., and later on the House of Lords confirmed the judgment of the appellate instance. With regard to the plaintiff's contention that sub-clauses (c) and (f) of Clause 14 in the bill of lading were null and void because of the combined effect of Article III rule 2 and rule 8, Viscount Kilmuir pointed out that the natural and ordinary meaning of rule 2 was to perform the tasks outlined therein in accordance with a sound system, and that the provision did not have a geographical significance.[39] Furthermore, Lord Morton of Henryton, cited and, thus, reaffirmed the decision in *"Pyrene v Scindia"*, holding that the words *"shall properly and carefully […] carry […] and discharge the goods carried"* meant that the carrier shall perform in a proper and careful manner only those duties that are imposed on him by the contract of carriage.[40] Lord Morton agreed with the interpretation given by Devlin J in *"Pyrene v Scindia"*, adding that it is not only more consistent with the object of the Rules, *"but it is also the more natural construction of the language used"*.[41] Likewise, Lord Somervell of Harrow also agreed with that interpretation of Article III

[38] For the carriage of goods on deck, see *Chapter IV*.
[39] *G.H. Renton & Co. Ltd. v Palmyra Trading Corporation of Panama (The "Caspiana")* – House of Lords (Viscount Kilmuir, Lord Morton of Henryton, Lord Tucker, Lord Cohen and Lord Somervell of Harrow) – Lloyd's Law Reports [1956] Vol 2, p. 379 at p. 388.
[40] *G.H. Renton & Co. Ltd. v Palmyra Trading Corporation of Panama (The "Caspiana")* – House of Lords (Viscount Kilmuir, Lord Morton of Henryton, Lord Tucker, Lord Cohen and Lord Somervell of Harrow) – Lloyd's Law Reports [1956] Vol 2, p. 379 at pp. 389-390.
[41] *G.H. Renton & Co. Ltd. v Palmyra Trading Corporation of Panama (The "Caspiana")* – House of Lords (Viscount Kilmuir, Lord Morton of Henryton, Lord Tucker, Lord Cohen and Lord Somervell of Harrow) – Lloyd's Law Reports [1956] Vol 2, p. 379 at p. 390.

rule 2, which leaves the door open for contractual arrangements that provide for the transfer of the cargo-related obligations listed in this respective provision of the Hague and Hague-Visby Rules.[42] That way, the House of Lords endorsed the observations made by Devlin J in *"Pyrene v Scindia"* that, pursuant to Article III rule 2, the carrier is not obliged to load, stow and discharge the goods carried, unless he has undertaken to do so, which is of great relevance to the validity of a FIOS clause, which allocates these duties and the responsibility for performing them.

The case *"Leigh and Sillivan Ltd. v Aliakmon Shipping Co. Ltd." (The "Aliakmon")*[43] confirms *in obiter* the decision in *"Pyrene v Scindia"* as well, and it is interesting, among other things,[44] for two implications that are involved. The first one relates to the question who is considered to be the party designated as the "owner" under the free-out clause in the bill of lading – the shipowner or the cargo owner – when the bill provides an ambiguous and uncertain answer to that question. The second issue concerns the impact of a FIO clause on the moment when a clean bill of lading (in particular, the representation *Shipped in apparent good order and condition*) starts acting as an estoppel, which prevents the shipowner from denying the apparent good order and condition of the goods upon shipment.

On the facts, the plaintiffs Leigh and Sillivan bought a cargo of steel coils which was loaded on the defendant's vessel the *Aliakmon* for the carriage from Inchon, South Korea on C&F terms[45] free out to Immingham, the UK. It is noteworthy that although most of the cargo was damaged during the voyage, upon discharge, and in the warehouse after discharge, part of the steel coils had been in a condition that did not comply with the contract of sale already before loading and that was marked in the mate's receipt. Nevertheless, a clean bill of lading was issued, which contained the following free out (FO) clause:

> *F.O. CARGO LOADED, STOWED AND TRIMMED BY OWNER AND TO BE DISCHARGED BY CONSIGNEE AT THEIR RISK AND EXPENSE PER BOOKING NOTE DATED AUG. 31, 1976 AT SEOUL.*

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[42] *G.H. Renton & Co. Ltd. v Palmyra Trading Corporation of Panama (The "Caspiana")* – House of Lords (Viscount Kilmuir, Lord Morton of Henryton, Lord Tucker, Lord Cohen and Lord Somervell of Harrow) – Lloyd's Law Reports [1956] Vol 2, p. 379 at p. 393: *"[Article III rule 2] is, in my opinion, directed and only directed to the manner in which the obligations undertaken are to be carried out. Subject to the latter provisions, it prohibits the shipowner from contracting out of liability for doing what he undertakes to do properly and with care."*

[43] *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd. (The "Aliakmon")* – Queen's Bench Division (Commercial Court) (Staughton J) – Lloyd's Law Reports [1983] Vol. 1, p. 203.; Lloyd's Law Reports [1986] Vol. 2, p. 1 (House of Lords).

[44] The main issue at stake was whether the plaintiff buyers had title to sue since, at the time the damage took place, the legal property in the cargo did not pass to the buyers but only the risk of damage did. In fact, there was no contractual link between the c&f buyers and the defendant shipowners, because the sellers and buyers modified the terms of their c&f contract of sale, whereby the risk passed from sellers to buyers upon shipment whereas the sellers reserved the right of disposal of the goods even upon endorsement of the bill of lading up until the moment the buyers paid the price of the goods after they have been discharged. Eventually, the Court of Appeal and then the House of Lords ruled against the claim of the buyers, who had neither the legal ownership nor a possessory title to the goods concerned.

[45] The C&F (Cost and Freight) term has been nowadays modified by the International Chamber of Commerce (ICC) into CFR (Cost and Freight) term ever since the Incoterms 2000 rules were issued. No other update of that term was made in the latest version of the rules known as Incoterms 2010 rules. Although C&F has been removed as an acronym since the Incoterms rules update in 2000, it still continues to be used by trading parties. See http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/

It was established and undisputed that most of the damage took place because of: (i) the over-stowage of the coils in the holds of the *Aliakmon*, which caused crushing of some of them, and (ii) carrying timber in the same holds where the coils were shipped, which resulted in condensation that caused rusting of the steel coils. Whereas both causes are, in general, attributable to poor stowage, Staughton J noted that the first one relates to the manner of stowing and securing the cargo and the second one relates to the stowage plan of the vessel.[46] Accordingly, the buyers of the cargo sued the shipowners, Aliakmon Shipping Line, for breach of the contract of carriage.

One of the issues that the first-instance judge came across was related to the responsibility for stowage under the FO clause where it is not clear whether "owner" means shipowner or cargo owner. This is crucial for the outcome of the case, for if owner had meant the cargo owners, then loading, stowing and trimming would have been the responsibility of the shipper and, hence, the shipowners would not have been liable for poor stowage following the *"Pyrene v Scindia"* approach to Article III rule 2 of the Hague-Visby Rules. Conversely, if "owners" had meant shipowner, then the shipowners would have been liable for the damage to the goods caused by bad stowage.

On the one hand, the expression FO, as opposed to FIO (free in and out), would suggest that loading is to be carried out by the shipowners since only discharge is free as it is under "free out". On the other hand, everywhere else on both sides of the bill of lading where the term "owner" appeared, it was explicitly specified whether reference was made to either the cargo owner, or the shipowner. To resolve this ambiguous situation, Staughton J. looked at the booking note, which contained the words: *"Berth terms loading/free out discharge"*, meaning that it was the shipowners who were designated by the word "owner" and who were responsible for loading, stowing and trimming the cargo; moreover, an addendum to the booking note expressly provided for that: "*Cargo to be loaded, stowed and/or lashed and/or shored and/or secured free of risk and expenses to the shipper"*.[47] Thus, it was the shipowners who, by the terms of the bill of lading, were to load and stow the cargo and were, therefore, held liable by the first-instance judge for breach of the contract.

Resorting to the booking note in order to interpret the contract of carriage and to clarify the intention of the parties is prompted by the fact that the terms of the contract are contained in and evidenced by the bill of lading, but the bill itself is not the contract. Although the bill of lading is a *prima facie* evidence of the contract, there are other sources like the booking note and the correspondence between the parties that also contain contract terms.[48]

The second issue in this case concerned the clean bill of lading as an estoppel, preventing the shipowners from denying the apparent good order and condition of the cargo, and, in particular, the FIO clause and its effect upon that estoppel. Staughton J. made an interesting observation that where the duty to load and stow has been transferred from the shipowners to the shippers (*i.e.* under free-in terms), the

[46] *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd. (The "Aliakmon")* – Queen's Bench Division (Commercial Court) (Staughton J) – Lloyd's Law Reports [1983] Vol. 1, p. 203, at p. 208.
[47] *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd. (The "Aliakmon")* – Queen's Bench Division (Commercial Court) (Staughton J) – Lloyd's Law Reports [1983] Vol. 1, p. 203, at pp 208-209.
[48] See *Chapter I*, section 2.1 on a bill of lading contract of carriage.

representation made in the bill of lading relates to the period after the duty has been completed by the shippers. Conversely, as it was the case in *The "Aliakmon"*, when no FI(O) clause is inserted, meaning that the loading and stowing of the goods are the responsibility of the shipowners, then the representation *"Shipped in apparent good order and condition"* relates to any time that is no later than the moment of loading.[49]

Staughton J's reasoning on this issue is in line with the English position on the FIOS(T) clause. As displayed so far, loading, stowing and discharging under English case law are considered part of the contract of carriage and thus these operations indeed lay within the ambit of the Hague-Visby Rules, but the parties are allowed freedom of contract on who will undertake these operations, which allows the carrier to be divested of responsibility for them. Therefore, the representation made in a clean bill of lading under a free-in clause relates after the moment the duty to load has been performed by the other party.

4.2 Incorporating a charter party FIO clause into a bill of lading

When charterparty clauses are incorporated in a bill of lading contract of carriage, that charter party must already have been concluded and in writing before the bill is issued.[50] Moreover, charterparty clauses must be expressly incorporated by reference in the bill of lading in order to form part of the B/L contract of carriage, whereas a general incorporation clause (*e.g. "incorporating all terms and conditions of the charter dated…"*) is said to incorporate only the primary clauses related to the carriage of goods that are directly germane.[51] The most frequent problems that arise in such incorporation are whether the clause as worded in the charter party will be applicable to the context of the bill of lading and whether it will be contrary to, for example, the Hague-Visby Rules. Courts can arbitrarily manipulate the wording of the charterparty clause only to the extent that it fits and makes sense in the context of the bill of lading.[52] Also, courts may have to interpret the identity of a party in a charterparty clause (*e.g.* the charterer or owner) when incorporated into the bill of lading.

The case *"Balli Trading Ltd. v Afalona Shipping Ltd." (The "Coral")*[53] is illustrative of the problems that appear when the bill of lading contains a general incorporation clause of a charter party, which contains a FIOS(T) clause. Although the court in that case does not provide a final ruling on whether the FIOS(T) clause is validly incorporated and does not violate Hague-Visby Rules' Article III rule 8, the case is symptomatic of the problems that arise when a free-in/free-out arrangement is not clearly communicated to the other bill of lading party – the cargo interests.

On the facts, the defendant shipowners Afalona Shipping time chartered their vessel *The Coral* to Gulf International Development and Investment Ltd. The ship was a self-trimming bulk carrier and her holds were designed in a way that made it very

[49] *Leigh and Sillivan Ltd. v. Aliakmon Shipping Co. Ltd. (The "Aliakmon")* – Queen's Bench Division (Commercial Court) (Staughton J) – Lloyd's Law Reports [1983] Vol. 1, p. 203, at p. 209.
[50] Simon Baughen – *'Shipping Law'*, 6th edition (2015), p. 78.
[51] *Ibid.*
[52] Simon Baughen – *'Shipping Law'*, 6th edition (2015), p. 78.
[53] *Balli Trading Ltd. v Afalona Shipping Co. Ltd. (The "Coral")* – Court of Appeal (Nourse LJ, Stocker LJ, Beldam LJ) – [1993] 1 Lloyd's Law Reports 1.

difficult to stow packaged cargo. The plaintiff cargo owners, Balli Trading Ltd., sued for damaged cargo under bills of lading, which covered the consignment of steel sheets from Durban, South Africa, to Trabzon, Turkey, and incorporated the provisions of the charter party and the Hague-Visby Rules.

On her way to Trabzon, the vessel called at Diliskelesi, where she discharged the cargo consigned for that port, but no actions were taken to re-stow the remaining cargo. During the further voyage to the port of destination, the vessel encountered stormy weather, as a result of which the cargo fell down and sustained damage. The claimants sued for damages for the breach of the contract of carriage, and they were seeking for a summary judgment on the ground that the defendant shipowners had no defence for that claim. The shipowners relied, among others, on clause 8 of the charter party stating:

> *…charterers are to load, stow and trim and discharge the cargo at their expense under the supervision of the Captain…*

Whereas at first instance the Admiralty Court ruled in favour of the plaintiffs, the Court of Appeal reversed the decision and held that the case was not suitable for summary proceedings since the defendants had a defence to the claim. The main points raised by Beldam L.J. were, first, that it was already established in *"Pyrene v Scindia"*, and approved in *"Renton v Palmyra"*, that Article III rule 2 of the Rules does not impose an obligation on the carrier to load, handle, stow, keep, care for, and discharge the goods carried; secondly, that the incorporation clause in the bill of lading was wide enough to incorporate a charter party provision which regulates the responsibility for loading and stowing. Thirdly, Beldam LJ admitted that there were two possible constructions of the charter party clause 8 as incorporated in the bill of lading:

> *The question is what construction is to be put upon conditions agreed between the owner and the charterer when they appear in the context of a bill of lading between the owner and the shipper. […] In their context of the bill of lading it seems to me that the Court has to choose between two possible constructions of cll. 2 and 8 of the charter-party. The first that the clause not only restricts the scope of the obligation undertaken by the shipowner but also relieves him from responsibility for damage caused to the goods in the course of loading or by reason of bad stowage (the defendant's construction); the second that it is inserted to make it clear that the shipowner is not personally going to carry out the obligation to see that these functions are properly carried out and will be liable if the charterer fails to do so (the plaintiff's construction which is compatible with the conclusion of the learned Judge).* [54]

While the Honourable Law Lord did not express his opinion on which is the correct interpretation, he ruled that the plaintiff failed to show that the defendant's interpretation of the bill of lading was unarguable so as to justify a summary judgment on this case. Therefore, the defendant's appeal was allowed.

The shipowner's reasoning in *The "Coral"* extended the transfer of the obligations to load, stow and discharge beyond the mere allocation of these duties between the

[54] *Balli Trading Ltd. v Afalona Shipping Co. Ltd. (The "Coral")* – Court of Appeal (Nourse LJ, Stocker LJ, Beldam LJ) – Lloyd's Law Reports [1993] Vol 1, p. 1, at pp 6-7.

parties to the bill of lading (the shipowner and the B/L holder), and suggested that these duties could be transferred to a third party – the charterer. However, although the shipowner's interpretation was accepted as arguably correct, it cannot be said that it was *the* correct one, mostly because the Court did not rule on that specific issue but it merely took a stance so far as the case concerned a claim for summary judgment. It is not a surprise that authors have serious doubts whether a Court could possibly regard such a provision as a clause defining the allocation of responsibility; it is rather perceived as a clause, which exempts the carrier from liability.[55] Accordingly, a transfer of these cargo-related obligations to a non-contracting party, such as the charterer, is deemed to fall foul of Article III rule 8 of the Hague-Visby Rules.

4.3 Enforceability of FIOS(T) provisions

4.3.1 *The "Jordan II"*

The approach adopted in the 1950s cases *"Pyrene v Scindia"* and *"Renton v Palmyra"* has been enshrined and applied in subsequent cases for almost half a century. Yet, it was challenged in 2004 in the pivotal case *The "Jordan II"*,[56] where the House of Lords was invited to depart from its earlier decision.

The vessel *Jordan II* was chartered by her owners, Islamic Solidarity Shipping Company, to TCI Trans Commodities A.G. for a voyage from Mumbai, India, to the Spanish ports of Barcelona and Motril. The ship, which was chartered on a Stemmor (1983) form, carried 435 steel coils from Mumbai to Motril under two bills of lading issued to the shipper in Mumbai. Jindal Iron and Steel Company Limited were the sellers and a shipper of the cargo, while Hiansa S.A. were the buyers and a consignee. When the coils were discharged in Motril, they were found to be damaged allegedly due to defective loading, stowing, lashing, dunnaging, stacking and/or discharge. The charterers (TCI) sued under the charter party, while the shippers (Jindal) and the receivers of the cargo (Hiansa S.A.) sued under the bills of lading. All the three instances – the High Court, the Court of Appeal, and the House of Lords – ruled in favour of the defendant shipowners.[57]

Both the voyage charterparty and the two bills of lading on the Congenbill form were governed by English law. The bills provided, among other things, that freight was to be payable as per charterparty and that all terms and conditions of the charterparty were incorporated in the bills of lading. The charterparty was originally designed for ore but for that particular voyage it was used for the carriage of steel coils. It incorporated the Hague-Visby Rules and contained, among others, clauses 3, 7, and 17 which provided:

Clause 3

[55] Simon Baughen – *'Shipping Law'* (4th edition), Routledge-Cavendish (2009), ISBN-13: 978-0-415-48719-1, p. 118.
[56] *Jindal Iron and Steel Co. Ltd. and Others v Islamic Solidarity Shipping Co Jordan Ltd. (The "Jordan II")* – Lloyd's Law Reports [2003], Vol. 2, p. 87 (Court of Appeal) ; Lloyd's Law Reports [2005], Vol. 1, p. 57 (House of Lords).
[57] The claimant charterers did not appeal the decision of the Court of Appeal and, hence, the dispute before the House of Lords was between the appellant cargo owners (the shipper and the consignee) and the respondent shipowners.

Freight to be paid at the rate of U.S.$ . . . per metric tonne F.I.O.S.T. — lashed/secured/dunnaged . . .

Clause 7

Charterers to have full use of all vessel's gear to assist in loading and discharging cargo . . .

Clause 17

Shippers/charterers/receivers to put cargo on board, trim and discharge cargo free of expense to the vessel. Trimming is understood to mean levelling off the top of the pile and any additional trimming required by the master is to be for owners account . . .

At first instance, the claimant charterers submitted that clause 3 transferred from the shipowners to the charterers only the obligation to pay for the operations listed therein, but not the responsibility to properly and carefully perform them. The shipowners, on the other hand, contended the opposite – that clauses 3 and 17 transferred the obligation to pay and also the responsibility to perform these tasks. The High Court held that the two clauses effectively transferred to the charterers the responsibility to properly perform the cargo operations, and that the defendants were not liable whatsoever as long as the damage was not caused by the acts or omissions of the shipowners, their servants or agents. The Court took into consideration the fact that Clause 17, unlike Clause 3, clearly intended the transfer of these activities to the shipper/charterers/receivers, and also that it was part of the printed form of the Stemmor charterparty.

The claimant charterers appealed, arguing that clause 17 was discordant with the rest of the contract because it referred to "trimming" (being a result of the Stemmor charterparty designed for ore cargoes) whereas steel could not be trimmed. The Court of Appeal rejected that argument, pointing to the dash in Clause 3 after the letter "T", which clearly stated what was required from the parties. The Court further stated that even if the second sentence of Clause 17 was erroneous, it was not fatal for the proper construction of the contract, because clauses 3 and 17 should be read together. Accordingly, the Court of Appeal rejected the appeal and reserved the decision reached by the first instance Court. The claimant charterers did not join the claimant cargo interests in further appeal before the House of Lords.

As to the cargo interests, at first instance they claimed damages under the bills of lading, to which the Hague-Visby Rules applied. Since the Court had held that the obligations for loading, stowing and discharging were validly transferred to the charterers by means of charterparty clauses 3 and 17, the main issue was what effect there would be on the bills of lading, which incorporated the charter party. The judge found out that the defendants were under no liability for damage caused by improper loading, stowage, dunnaging, securing or discharging not only under the charterparty but also under the contract of carriage contained in and evidenced by the two bills of lading. Nigel Teare Q.C. held that clause 17 clearly indicated that the responsibility for the proper performance of putting the cargo on board, lashing, securing, dunnaging and discharging was transferred to the cargo interests. The cargo-related activities at the port of loading were transferred to the shipper and those at the port of discharge – to the receivers, respectively.

However, an important stipulation was made by the High Court. In case the receivers filed a claim regarding damage that had taken place during cargo operations at the port of loading, the defendants could not contend that the responsibility for those operations stayed with the receivers. The defendant shipowners could rather raise the defence in Article IV rule 2(i)[58], namely that they had not undertaken to perform cargo operations at the port of loading and that they were not responsible for any loss or damage to the cargo resulting from act or omission of the shipper. Similarly, where a claim was filed by the shippers for damage that occurred at the port of discharge, the defendant shipowners could resort to the defence in Article IV rule 2(q)[59] if they could prove that the damage took place without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier.

The claimants appealed that judgment before the Court of Appeal, and the shipowners cross-appealed the holding of the first-instance judge that they had to resort to the Hague-Visby Rules defences in Article IV in order to deny liability. The shipowners raised the argument that they need not to rely on the defences in Article IV because there was no breach of Article III rule 2 in the first place. The cargo interests, on the other hand, submitted that if charterparty clauses 3 and 17 were validly incorporated in the bills of lading and had the effect of rendering the shipowners not responsible for loading, stowage and discharge, and, accordingly, not liable for cargo damage arising out of these operations, then these two clauses relieved the shipowner from the obligations listed in Article III rule 2, which would make them null and void pursuant to Article III rule 8. The Court of Appeal addressed that argument by referring to the *dicta* of Devlin J in *"Pyrene v Scindia"*, which was approved in *"Renton v Palmyra"*, and said that it was bound by the decision in the latter case where this issue was already settled – the obligation in Article III rule 2 of the Hague Rules does not refer to the scope of the contract service, and thus does not require the carrier to perform these cargo operations, but it refers to the terms on which this service will be performed, meaning that the carrier will be obliged to carry out these tasks only if he has undertaken to do so. Accordingly, the appeal of the claimants was dismissed.

On the other hand, the cross-appeal of the shipowners was allowed by the Court of Appeal. The Court accepted the argument of the defendants that they did not undertake to perform, or to be responsible for, any cargo work at the port of loading and the port of discharge; and since Clauses 3 and 17 relieved the shipowners of any liability for damage arising out of cargo operations, the defendants did not need to resort to the defences provided in Article IV in order to escape liability.

However, eminent authors like Simon Baughen point to a particular difficulty that arises from that ruling.[60] The result from the Court of Appeal's decision, in

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[58] Article IV rule 2(i) of the Hague-Visby Rules states: *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: […] (i) Act or omission of the shipper or owner of the goods, his agent or representative."*

[59] Article IV rule 2(q) states: *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: […] (q) Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."*

[60] Simon Baughen – *'Shipping Law'* (4th edition), Routledge-Cavendish (2009), ISBN-13: 978-0-415-48719-1, p. 117.

conjunction with the fact that there is no contractual nexus between the shipper and the receivers under the contract of carriage, is that the receivers of the goods have no contractual recourse to sue neither the shipowners, nor the shipper with respect to damage that occurred during loading or stowing. Similarly, the shipper will have no valid claim against either the shipowners, or the receivers of the goods with regard to damage that took place during discharge of the cargo. In such a hypothetical situation, the receiver of the goods will have as an only option to hold the shippers responsible for cargo damage during loading under the contract of sale and *vice versa*.

The first and the third claimants, the shipper and the receivers (the cargo interests), respectively, appealed the decision of the Court of Appeal, whereas the second claimant, the voyage charterers, did not take part in the appeal before the last instance – the House of Lords.

The Court of Appeal's interpretation of clauses 3 and 17, in the sense that these two clauses indeed intended to relieve the shipowners from responsibility over cargo-related operations, was not appealed and referred to the House of Lords. Instead, the issue that was brought before the Honourable Law Lords was whether the shipowners were entitled to contract out their responsibility by means of clauses 3 and 17 of the charter party without falling foul of Article III rule 2 and rule 8 of the Hague-Visby Rules. In other words, the cargo interests asked the House of Lords to depart from its 1956 decision in *"Renton v Palmyra"*. In particular, the claimants submitted that, pursuant to Article III rule 2 of the Hague-Visby Rules, the shipowners were obliged as carriers to perform the cargo operations listed therein and to perform them properly and carefully.

The House of Lords rejected that submission as it pointed out several arguments. First, the Honourable Law Lords held that under common law the obligation to load, stow and discharge *prima facie* lies on the shipowners but it can be contractually transferred to the cargo interests. Secondly, they emphasized on the importance of the certainty in international trade law and allowed that they may depart from a previous decision under the Practice Statement [1966],[61] as invited by the claimants, only *"where that decision has been demonstrated to work unsatisfactorily in the market place and to produce manifestly unjust results"*,[62] which was not the situation in the present case. Another argument was that the decision in *"Renton v Palmyra"* had stood for more than 50 years and there were no objections to it neither at the adoption of the 1968 Brussels Protocol to the Hague Rules, nor when the enactment of UK COGSA 1971 was discussed in the English Parliament, nor in the UK trade journals and publications. With regard to the decisions in foreign jurisdictions, in which it was held that the duties to load, stow and discharge under US COGSA were non-delegable and on which the *Counsel* in the present case heavily relied, the House of Lords noted that those decisions did not make any reference to the earlier English cases *"Pyrene v Scindia"* and *"Renton v Palmyra"*. Those US decisions, among which there was the US case *Associated Metals & Minerals*

[61] The Practice Statement is a statement made in the House of Lords in 1966 by Lord Gardiner. It allowed the House of Lords (the then Highest Court) to depart from its own previous decisions *"when too rigid adherence to precedent may lead to injustice in a particular case and also unduly restrict the proper development of the law"*.

[62] *Jindal Iron and Steel Co. Ltd. and Others v Islamic Solidarity Shipping Co Jordan Ltd. (The "Jordan II")* – Lloyd's Law Reports [2005], Vol. 1, p. 57, at p. 63.

Corp. v. M/V Arktis Sky that was discussed above in the current thesis[63], did not address any of the arguments raised in the two previous English cases and that is why they could not be used to challenge the English approach to the issue at stake. Eventually, the House of Lords did not venture to assess the correctness of the interpretation of Article III rule 2 in *"Renton v Palmyra"*, but it refused to depart from that decision and, accordingly, the appeal was dismissed.

Although the case did not change the law, nor did it provide an innovative interpretation of the law, the reasoning of the House of Lords was interesting with its purposive reading of the Rules. By supporting the *"Renton"* decision, the Honourable Law Lords provided certainty in the day-to-day shipping business. The House of Lords admitted that a FIOS(T) provision alone would indicate only the transfer of cost and not the transfer of responsibility,[64] but read together with additional clauses in the charter party to that effect, and provided that express and clear words are used, the cargo-related obligations can be validly transferred. This leads to the conclusion that, when the parties under a contract of carriage decide to alter their responsibilities with regard to the loading, stowing, and unloading the cargo, precise drafting should be applied. Carriers who do not want to be exposed to risks pertaining to the actions of stevedores, whom the carrier neither contracted with, nor paid for, must be aware that reliance on a sole FIOS clause may not be sufficient for contracting out the responsibility and risk with regard to cargo handling.

4.3.2 *The "Eems Solar"*

The "Eems Solar"[65] is the most recent case in which the Court had to rule on the validity of a charterparty FIOS clause incorporated in the bills of lading. This was a cargo claim, which involved the transfer of the obligation and responsibility to stow from the contractual carrier to the cargo owner.

On 28 July 2010 the defendant Eems Beheerder BV, shipowners of *MV Eems Solar* (the vessel) and *MV Eems Spirit*, entered into a voyage charterparty agreement with Southern Transport Agency Co Ltd, of Sochi, Russia, for the carriage of two consignments of steel coils from Tianjin Xingang in China to Novorossiysk in Russia. The charterparty was on the Gencon 1994 form (BIMCO's general voyage charter party), whose Clause 5(a) provided for:

> ***5. Loading/Discharging***
> *(a) Costs/Risks*
> *The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured by the Charterers, free of any risk, liability and expense whatsoever to the Owners. The Charterer shall provide and lay all dunnaged material as required for the*

[63] See section 3 *supra*.
[64] Considering the *Jordan II* ruling, the Singapore High Court ruled in a free-in-liner-out case that a FIOS clause found only in a general freight provision in a Liner Booking Note (Conlinebooking 1978 Standard Form, Box 10: Freight rate) was not sufficient for the carrier to contract out the responsibility and the risk of loading. See *Subiaco Pte Ltd v Baker Hughes Singapore Pte (The "Achilles")* [2010] SGHC 265.
[65] *Yuzhny Zavod Metall Profil LLC v Eems Beheerder B.V. (The "Eems Solar")* – Queen's Bench Division (Admiralty Court) (Jervis Kay Q.C., Admiralty Registrar) – 5 June 2013 – Lloyd's Law Reports [2013] Vol. 2, p. 489.

> *stowage and protection of the cargo onboard, the Owners allowing the use of all dunnaged available on board.*

The contract of carriage between the defendant shipowner and the claimant cargo owner and B/L holder, Yuzhny Zavod Metall Profil LLC, was evidenced in a Congenbill 1984 bill of lading dated 10 August 2010 and signed by the master of the vessel *Eems Solar*. Clause 1 of the Conditions of Carriage of the bill of lading provided that:

> *All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause are herewith incorporated.*

The bill of lading also contained a General Paramount Clause, which incorporated the Hague Rules in the contract of carriage.

The cargo, 411 coils of steel sheets, was loaded by local stevedores on the vessel *Eems Solar*. During the voyage the vessel experienced adverse weather conditions in the Indian Ocean and the Arabian Sea, where she was exposed to strong winds and heavy swells because of the monsoon season. When the vessel arrived at the place of destination in late September 2010, and upon discharge, it was discovered that 34 of the coils were damaged to a different degree and an independent pre-discharge survey report indicated that the coils had been shifting during the voyage. The cause of the damage was poor stowage due to lack of locking coils and systematic lashing. The stowage plan was prepared and provided by the master but carried out by local stevedores hired by the shipper.

The total amount of the cargo claim came up to US$ 156,908 and was for breach of contract and/or the duty to load, stow, handle, carry and care for the cargo. The claimant also submitted that the defended failed to exercise due diligence to ensure a seaworthy vessel and to properly equip and supply her in that she left the port of loading without spare lashing materials. With regard to clause 5(a) of the Gencon charterparty, the claimant contended that the clause was not properly incorporated in the bill of lading since it was not consistent with the express terms of the bill. The claimant further submitted that, even if incorporated, the clause would be rendered null and void under Article III rule 8 of the Hague Rules.

The defendant contended that the sole reason for the damage was poor stowage, for which the defendant was contractually absolved from responsibility. Neither was the master and crew responsible to rectify stowing deficiencies during the voyage.

The Court dismissed the claim against the shipowners. Jervis Kay Q.C. held that the lack of spare lashing materials did not amount to unseaworthiness of the vessel. The damage occurred as a result of movement of the cargo due to the lack of locking coils to secure the cargo, which was a result of poor stowage that was unable to meet the foreseeable weather conditions. It was established that the cargo was stowed by local stevedores who were employed on behalf of the shipper/cargo owner, notwithstanding that it took place in accordance with the ship's stowage plan and with the full knowledge of the master. The Court held that since there was no evidence that the stowage plan had contributed to the improper stowage or that the stevedores paid any attention to the plan, it was not considered an intervention in the process on behalf of the master so as to shift the responsibility for cargo stowage on the shipowners.

With regard to the legal responsibility for stowage, clause 1 of the bill of lading was found to be wide enough to incorporate clause 5(a) of the charterparty, which transferred the responsibility for stowing the cargo from the shipowners to the charterers. While accepting that the wording of the clause did not expressly transfer the responsibility for stowing to the cargo owners who were not also charterers, the Court construed the clause as one by which the parties to the bill of lading contract intended to exclude shipowner's responsibility for stowing and to transfer it to the cargo owners:

> *Although it is correct to say that there is nothing in the wording which transfers the responsibility for loading the cargo to cargo owners who are not also charterers, nonetheless the wording is sufficiently clear to make it apparent that the shipowner intended to exclude his own responsibility for the manner in which the loading was performed. […] It seems to me to follow that, as between themselves, the parties to the bill of lading must have thereby intended the responsibility of the stowage to have been transferred to the shippers/cargo owners.* [66]

Having found the FIOS clause validly incorporated in the contract of carriage, the Court cited *"Renton v Palmyra"* in holding that Article III rule 2 does not impose on the carrier to perform loading and stowing; it further relied on *The "Jordan II"* decision in that Article III rule 8 does not invalidate a FIOS clause incorporated in a bill of lading.

There are three significant implications, which stem from this decision that are worth considering. First of all, *The "Eems Solar"* case provides valuable insights for the day-to-day shipping industry as it involves carriage on FIOS terms that includes the Gencon 1994 charterparty and the corresponding and widely-used Congenbill 1994. Although clause 5(a) of the charterparty in this particular case was modified so as to exclude the phrase *"and taken from the holds and discharged"* (found in the original Gencon 1994) in order to give effect to a transfer of responsibility only for loading, stowing and/or trimming, tallying, lashing and/or securing the cargo, there is no reason why the principle taken by the Court in this case should not apply mutatis mutandis to discharge operations as well.

Secondly, Jervis Kay Q.C. provided a practical restatement of the law on the validity of FIOS clauses:

> *…where the responsibility for the stowage has been contractually passed from the shipowner to the charterer (or the cargo owner) the shipowner will not be liable for damage arising from improper stowage* ***even if it renders the vessel unseaworthy unless it is established that the bad stowage leading to the damage arose from a significant intervention by the shipowners or their master****. In this respect it seems that the "intervention" must be significant in the sense that it operate so as to tie the stevedores' hands and was caused only by the captain's orders or was the result of matters of*

[66] *Yuzhny Zavod Metall Profil LLC v Eems Beheerder B.V. (The "Eems Solar")* – Queen's Bench Division (Admiralty Court) (Jervis Kay Q.C., Admiralty Registrar) – 5 June 2013 – Lloyd's Law Reports [2013] Vol. 2, p. 489, at p. 518, para. 95.

> *which the captain was, but the charterers were not, aware.*[67]
> [emphasis added]

This paragraph summarizes the new development, introduced by this case, in defining the limits of the carrier's responsibilities over the cargo, and there is little doubt that such a view will be more than welcomed by shipowners and P&I clubs.

Thirdly, *The "Eems Solar"* decision affirmed the effective transfer of the obligation and responsibility to stow the cargo from the carrier to the bill of lading holder, even where the responsibility clause in the incorporated charterparty does not refer to the *"shipper"* or *"receiver"* but only mentions the *"charterer"*. This is a significant increase in the protection of contractual carriers who seek to contract out their responsibility for cargo-related operations; and it certainly goes beyond the protection afforded by the House of Lord case *"Jordan II"*, where the respective charterparty clause included the words *"shippers/charterers/receivers"*.[68]

4.4 FIOS(T) clauses in charterparty agreements

4.4.1 Transferring cargo-related operations to the charterer – general position

The shipowners and the charterers have freedom of contract to agree on precisely what operations will be transferred and this is done through modifying or using a variation of the FIOS(T) clause. For example, a FIO (free in and out) clause will delegate to the charterer the obligations to load and to discharge, whereas through the FIS arrangement (free in and stowed) the shipowners will contract out only the duties to load and to stow the cargo.[69] Furthermore, the two parties to a charterparty contract of carriage may also agree whether these clauses will have an effect only on the costs for performing these operations, or whether they will actually transfer the responsibility for performing them.

In principle, a standard charter party clause that transfers the respective obligations from the shipowner to the charterer will usually read:

> *The cargo shall be brought into the holds, loaded, stowed and/or trimmed, tallied, lashed and/or secured and taken from the holds and discharged by the Charterers, free of any risk, liability and expense whatsoever to the Owners. […]*[70]

A clause worded in that way is less prone to disputes between the parties as regards the transfer of the obligations in question. However, a FIOS clause may have less clear and ambiguous wording, which makes it difficult to outline the intention of the contracting parties. Such a problem appeared in *The "Visurgis"*,[71] where the various cargo-related duties were distributed between the shipowners and the charterers in a seemingly contradictory way. The court, however, held that the charterparty contract

[67] *Yuzhny Zavod Metall Profil LLC v Eems Beheerder B.V. (The "Eems Solar")* – Queen's Bench Division (Admiralty Court) (Jervis Kay Q.C., Admiralty Registrar) – 5 June 2013 – Lloyd's Law Reports [2013] Vol. 2, p. 489, at p. 520, para. 99.
[68] See section 4.3.1 *supra*.
[69] For the precise meaning of the FIOS(T) terminology, see section 2 above.
[70] This is a printed Clause 5(a) of Gencon 94 voyage charter party.
[71] *The "Visurgis"*, [1999] 1 Lloyd's Law Reports 218.

should be read as a whole, and did not find a conflict in the various clauses of the amended Gencon voyage charterparty form splitting the duties as follows: charterers responsible for loading and stowing, while shipowners responsible for lashing, securing and dunnaging.[72]

Furthermore, a FIOS(T) clause may also be qualified by a specific wording that attempts to revert the responsibility for loading, stowing, etc. back to the shipowners such as:

> *…Charterers are to load, stow, lash, secure, unlash, trim and discharge and tally the cargo at their expense under the supervision of the Captain…*[73]

The effect of this clause is to transfer the obligations listed above to the charterer, regardless of the phrase "under the supervision of the Captain". English courts make clear distinction between a right to supervise and a duty to supervise, and such wording does not bestow upon the shipowners an obligation; it is merely *"an entitlement to supervise"*.[74] This transfer of cargo-related duties is, however, subject to two exceptions: the first exception is where the master supervised the loading of the cargo and it was his supervision and/or intervention that led to the damage or loss of the cargo; the second exception is where the damage or loss are attributed to the want of due care in matters related to the vessel, for which the master had, or should have had knowledge, but the charterers did not.[75] The second exception, for example, was invoked by the charterers in *The "Socol 3"*, where the loss of deck cargo was held to be due to poor on-deck loading, which caused the vessel's instability, the latter being within the knowledge of the chief officer. Thus, the owners were in breach and could not escape liability, although the time charterparty put the obligation to stow on the charterers.[76]

As to the scope of the phrase "under the supervision of the captain", as it will be seen below, it is not tantamount to holding the shipowners responsible for stowage or for exercising due supervision over stowage.[77] In fact, such wording allows the captain to intervene in the aforementioned cargo-related operations but this is rather a right than an obligation owed by the master, and therefore absence of intervention on behalf of him does not convey liability.[78] Thus, in the absence of the words "and responsibility" in such a charterparty clause, it is the charterers, and not the shipowners, who will be liable for damages that arise from the actions or negligence of the stevedores.

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[72] *The "Visurgis"*, [1999] 1 Lloyd's Law Reports 218, at pp. 223-224.

[73] *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft GmbH & Co KG* – Queen's Bench Division (Commercial Court) (Morrison J) – 14 March 2006 – Lloyd's Law Reports [2006] Vol 2, p. 66; Lloyd's Maritime Law Newsletter [2006] 689, p. 1. The charter party in this case incorporated the Hague-Visby Rules.

[74] *Compania Sud American Vapores v MS ER Hamburg Schiffahrtsgesellschaft GmbH & Co KG* – Queen's Bench Division (Commercial Court) (Morrison J) – Lloyd's Law Reports [2006] Vol 2, p. 66, at p. 79, para. 42.

[75] *Court Line Ltd. v Canadian Transport Co Ltd* – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – 8 April 1940 – Lloyd's Law Reports [1940] Vol. 1, p. 161. See *section 4.4.2* below.

[76] *Onego Shipping & Chartering BV v JSC Arcadia Shipping (The "Socol 3")* – [2010] 2 Lloyd's Law Reports 221.

[77] *Court Line Ltd. v Canadian Transport Co Ltd* – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – 8 April 1940 – Lloyd's Law Reports [1940] Vol. 1, p. 161.

[78] Prof. Nicholas Gaskell (University of Southampton) – *'Charterer's Liability to Shipowner – Orders, Indemnities and Vessel Damage'*, reprinted in *'Modern Law of Charterparties'* (edited by Johan Schelin, LL.D.), Jure Forlag AB (2003), Sweden, ISBN: 91-7223-172-6, p. 19 at p. 46.

Conversely, if these crucial words "and responsibility" are included in the clause, then the shipowner will be held liable for the actions or negligence of the stevedores, despite the fact that it is the charterer who will pay for the charges of the stevedores. Yet, there is still an escape way for the shipowner even where the words "and responsibility" are incorporated in the clause, and this was stated *obiter* by Neil LJ in *The "Shinjitsu Maru No. 5"*:

> *In the end I have come to the conclusion that […] the words "and responsibility" [are] a prima facie transfer of liability for bad stowage to the owners but that if it can be shown in any particular case that the charterers by, for example, giving some instructions in the course of the stowage, have caused the relevant loss or damage the owners will be able to escape liability to that extent.* [79]

This assertion is accurate and it has been applied in other cases, which is clearly exemplified below in *sub-section 4.7.3.1.* Although the wording "and responsibility" shifts back to the shipowner the responsibility for faulty loading or stowage, as the case may be, this phrase is not definitive in apportioning the liability under a FIOS(T) clause for the damaged or lost cargo. This view was confirmed also in *The "Alexandros P"* where Steyn J. underlined that the words "and responsibility" effect a *prima facie* shift of the responsibility to the shipowners, subject to an eventual charterer's intervention which could render the charterers liable.[80] The claim in that case concerned damage to the vessel caused by the stevedore's negligence in discharging the goods under a FIOST clause laid down in cl. 8 of the widely-used NYPE time charterparty. Steyn J. equated the transfer of responsibility with a risk that the shipowners contractually assumed, and therefore the charterers were not held liable for the damages sustained to the vessel although the damage was caused by the stevedores who were hired by the charterers.[81] In such a situation, a shipowner could not resort to Article IV rule 2(i), even if the charterer is a shipper or owner of the goods, because no goods were damaged.

To sum up, the absence of the words "and responsibility" shields the shipowners from liability. What is more, the words "to the Master's satisfaction" or "to the entire satisfaction of the Master" do not have the function of substituting the words "and responsibility".[82] Neither does the addition of the words "and directions".[83] Therefore, in order for the shipowner to be held responsible for carrying out this duty, a stronger and express wording is needed. As stated by Langley, J., in *The "Imvros"*, when the obligations to load, stow and lash are expressly placed upon the charterers, *"the references to loading and lashing 'under the supervision of the captain' and 'to the master's satisfaction' and 'to the entire satisfaction of the master' are not expressed as qualification upon the obligations of the charterers; [...] a right to intervene does not*

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[79] *A. B. Marintrans v. Comet Shipping Co. Ltd. (The "Shinjitsu Maru No. 5")* – Queen's Bench Division (Commercial Court) (Neil LJ) – Lloyd's Law Reports [1985] Vol. 1, p. 568 at p. 575.
[80] *Alexandros Shipping Co. of Piraeus v MSC Mediterranean Shipping Co. S.A. of Geneva (The "Alexandros P")* – [1986] 1 Lloyd's Law Reports 421, at p. 424.
[81] *Alexandros Shipping Co. of Piraeus v MSC Mediterranean Shipping Co. S.A. of Geneva (The "Alexandros P")* – [1986] 1 Lloyd's Law Reports 421, at p. 424. (*ibid.*)
[82] *Transocean Liners Reederei G.m.b.H. v Euxine Shipping Co. Ltd. (The "Imvros")* – Queen's Bench Division (Commercial Court) (Langley J) – 9 March 1999 – Lloyd's Law Reports [1999] Vol. 1, p. 848.
[83] *'Newcastle P&I v Assurance Foreningen Gard Gjensidig'* – Queen's Bench Division (Commercial Court) (Colman J) – 24 April 1998 – Lloyd's Law Reports [1998] Vol. 2, p. 387 at p. 403.

normally carry with it a liability for failure to do so let alone relieve the actor from his liability".[84]

4.4.2 The intervention proviso: "under the supervision of the master"

The House of Lords case *"Court Line Ltd. v Canadian Transport Company Ltd"*[85] from the 1940 is an important one because it is this case that elucidates the so called "intervention proviso", which relates to the intervention of the captain upon loading, stowing and/or discharge performed under a FIOS agreement between the shipowners and the charterers.

In this case, the vessel *Ovington Court* was time chartered by her owners (Court Line Ltd.), to the charterers (Canadian Transport Company). During the duration of the charter party, the cargo carried on board, wheat in bulk was damaged as a result of improper stowage, and the shipowners were liable to pay the sum of £101 to the receivers under several bills of lading. The shipowners' P&I Club paid the entire sum to the receivers as Court Line were required to refund £10 franchise to the Club.

Clause 8 of the charter party stated:

> *The captain (although appointed by the owners) shall be under the orders and direction of the charterers as regards employment or agency; and* ***charterers are to load, stow, and trim the cargo at their expense under the supervision of the captain****, who is to sign bills of lading for cargo as presented, in conformity with mates' or tally clerks' receipts. Owners to give time-charterers the benefit of their protection and indemnity club insurances as far as club rules allow, and in case of shortage or damage to cargo, charterers to bear the franchise according to club rules, which owners would have otherwise borne.* [emphasis added][86]

In essence, the claimant shipowners contended that they were to be repaid by the defendant charterers the sum of £101, which the shipowners had been required to pay to the bills of lading holder in respect to the damaged cargo. The shipowners claimed that the charterers were liable under clause 8 of the charter party for improper stowage. At first instance, Lewis J affirmed the award given by the arbitrator, namely that the shipowners were to recover from the charterers only the £10 franchise which the shipowners had had to bear in order to receive any indemnity from their Club. This decision was reversed by the Court of Appeal, which ruled, among others, that upon a true construction of the charter party the responsibility for stowage fell on the charterers and, accordingly, the shipowners were entitled to claim the full amount of the damage, which is £101. The time charterers appealed to the House of Lords.

In establishing whether the claimant shipowners were entitled to £101, £10 or nothing, the House of Lords found, *inter alia*, that the expression *"under the supervision of the captain"* did not limit the obligation of the charterers to load, stow and trim the cargo. What is more, the master has in any event the right to supervise as a matter of

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[84] *The "Imvros"* [1999] 1 Lloyd's Law Reports 848 at p. 851.
[85] *Court Line Ltd. v Canadian Transport Co Ltd* – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – 8 April 1940 – Lloyd's Law Reports [1940] Vol. 1, p. 161.
[86] *Court Line Ltd. v Canadian Transport Co Ltd* – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – 8 April 1940 – Lloyd's Law Reports [1940] Vol. 1, p. 161, at p. 162.

course.[87] Lord Atkin rejected the defendants submission that the damage was a result of the captain's omission to exercise due supervision as being an ill-founded defence, and pointed out that the supervision for stowage was in any event intended to prevent the ship from becoming unseaworthy.[88] Therefore, the charterers were able to escape liability only if they proved that the damage took place as a result of the captain's orders or intervention, but not as a result of the captain's reservation of his right to intervene.[89] The "intervention proviso" was affirmed also by Lord Porter:

> *It might be also that if it were proved that the master had exercised his rights of supervision and intervened in the stowage, again the responsibility would be his and not the charterers'.*[90]

The effect of these words is that the charterers are the responsible party for the primary duty of loading, stowing and trimming, which they will perform at their expense and under the supervision of the master, whereas they will be relieved from liability only to the extent that the master, in exercising his right to supervise, limits the control of the charterers over the performance of these duties. The decision of the Court of Appeal was reserved.

4.4.3 Qualifying the FIOS(T) clause:

4.4.3.1 The addition of the words "under the responsibility of the master"

The words "under the responsibility of the master" have a far greater significance that "under the supervision of the master" when the transfer of liability for damaged or lost cargo is concerned. In the former case, the responsibility for loading and stowing, which has been intended to be transferred to the charterer via a FIOS(T) clause, is reverted back to the shipowner. Furthermore, the words "and responsibility" relate to the relevant operations in their entirety and cover not only the mechanical aspect of loading, stowing, trimming and discharging, but also processes such as the strategic planning of these processes.[91] However, as pointed out in section *4.7.1* above, even in this case there is an escape way for the carrier. The following two English cases – *"Ismail v Polish Ocean Lines" (The "Ciechocinek")*[92] and *"MSC Mediterranean Shipping Company S.A. v Alianca Bay Shipping Company Ltd." (The "Argonaut")*[93] – are illustrative of the point that, even though the prime responsibility for loading, stowing and discharging is conferred upon the shipowners, this responsibility is not absolute and

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[87] *Court Line Ltd. v Canadian Transport Co Ltd* – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – 8 April 1940 – Lloyd's Law Reports [1940] Vol. 1, p. 161, at p. 166.
[88] *Ibid. Court Line Ltd. v Canadian Transport Co Ltd* – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – 8 April 1940 – Lloyd's Law Reports [1940] Vol. 1, p. 161, at p. 166.
[89] *Ibid. Court Line Ltd. v Canadian Transport Co Ltd* – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – 8 April 1940 – Lloyd's Law Reports [1940] Vol. 1, p. 161, at p. 166.
[90] *Court Line Ltd. v Canadian Transport Co Ltd* – House of Lords (Viscount Maugham, Lord Atkin, Lord Wright, Lord Romer and Lord Porter) – 8 April 1940 – Lloyd's Law Reports [1940] Vol. 1, p. 161, at p. 172.
[91] *Alexandros Shipping Co. of Piraeus v MSC Mediterranean Shipping Co. S.A. of Geneva (The "Alexandros P")* – [1986] 1 Lloyd's Law Reports 421, at p. 424.
[92] *Ismail v Polish Ocean Lines (The "Ciechocinek")* – Court of Appeal (Lord Denning, M.R., Lord Justice Ormrod and Lord Justice Shaw) – Lloyd's Law Reports [1976] Vol. 1, p. 489.
[93] *MSC Mediterranean Shipping Company S.A. v Alianca Bay Shipping Company Ltd. (The "Argonaut")* – Queen's Bench Division (Commercial Court) (Leggatt J) – 25, 26 February 1985 – Lloyd's Law Reports [1985] Vol. 2, p. 216.

may be altered by other provisions of the charterparty or by the conduct of the charterers.

The "Ciechocinek" concerned a voyage charter party concluded for the carriage of 1400 tons of potatoes from Alexandria, Egypt to Boston, Lincolnshire in the UK. The claimant, Dr. Ismail, chartered the vessel *Ciechocinek* from her respondent owners Polish Ocean Lines. The Nuvoy charter party incorporated the Hague Rules, and the relevant printed clauses stated:

> *18(c). Free in and stowed. The Charterers shall load and stow the cargo free of any expense whatsoever to the Owners.*
>
> *19. […]The Charterers shall provide and pay for all dunnage material as required by the Master for the proper stowage and protection of the cargo, the Owners allowing the use of all dunnage available on board. The dunnage shall be laid under Master's supervision.*

Further, two typewritten clauses were added, which stated:

> *49. Dunnaging and stowage instructions given by the charterers to be carefully followed* ***but to be executed under the supervision of the Master and he is to remain responsible for proper stowage and dunnaging****.* [emphasis added]
>
> *53. The vessel to be responsible for number of packages as signed for in Bills of Lading, but not for rot, decay or deterioration.*

Part of the consignment was packed in boxes, while another part was packed in polythene bags. Having admitted that potatoes are cargo that requires good ventilation, the vessel's chief officer calculated that she could carry no more than 1000 tons of potatoes if they were to be properly ventilated, although the capacity of the vessel was 1400 tons of weight. At the port of loading, the shipper, Dr. Ismail was absent but he authorized his brother – Mr. Ismail – to give instructions regarding loading of the cargo. Mr. Ismail rejected the proposal of the master and chief officer, and insisted that all the 1400 tons of potatoes be loaded on the vessel. Moreover, he assured that the potatoes were packed in a new type of bags which made dunnage unnecessary. Nevertheless, the master was hesitant and raised an objection against Mr. Ismail's instructions. As a response, the latter promised to provide a surveyor's certificate saying that dunnage was unnecessary, as well as a guarantee in writing in order to protect the shipowners from any consequences arising from the stowing of the cargo in the way Mr. Ismail instructed. Given the far better expert knowledge of Mr. Ismail about potato shipments, the master agreed to the loading of all the 1400 tons of potatoes.

Despite the master's requests, the promised certificate and guarantee were never provided. Upon arrival, half of that part of the potatoes, which were stowed in bags without the necessary dunnage, was found to be rotten. It was assessed by the arbitrators that one-third of the damage was caused by inherent vice, while the other two-third by improper stowage. The shipowners were sued by the charterers for improperly stowed cargo. The shipowners denied and in their defence they contended, *inter alia*, that: (1) the improper stowage was the result of the charterer's instructions and that the owners were exempt under clause 49 of the charter party; (2) the instructions given by Mr. Ismail were tantamount to an estoppel which exempted the

owners from improper stowage; (3) the owners could rely on clauses 19 and 53, as well as on Article IV rule 2 (m)[94] and (q)[95] of the Hague Rules.

The arbitrators made an award in favour of the claimant shipper to the amount of two-thirds of the damage. However, they stated a special case and referred questions to the Commercial Court. The court upheld the arbitration award, after which the shipowners appealed.

The Court of Appeal held, among others, that by force of clauses 18 and 19, the obligation to load and stow was delegated to the charterers, and that the Hague Rules obligation set in Article III rule 2 did not apply since, following the reasoning in *"Pyrene v Scindia"*, the obligation to properly and carefully load and stow applies only in respect of any loading or stowing which the owner has undertaken under the contract of carriage, whereas in the present case the owners did not contract to perform any loading or stowing.

As to the controversial clause 49 of the charter party,[96] which attempts to qualify clause 18(c), Lord Denning referred to *"Canadian Transport v Court Lines"*, pointing that the master had a right to supervise stowage as a matter of course but his responsibility did not stretch beyond ensuring the safety of the vessel and of the cargo so that it can withstand the ordinary incidents of the sea journey. The concluding words of the clause – *"[the master] is to remain responsible for proper stowage and dunnaging"* – were held not to apply. Lord Denning based his reasoning, first, on the fact that the charterer, Mr. Ismail, voluntarily stowed the goods in a way which rendered them incapable of withstanding the ordinary incidents of the voyage, and, secondly, on the fact that the shipper assured that no dunnaging was needed for the cargo, through which the shipper/cargo owner assumed responsibility for poor stowage. Alternatively, the shipowners were entitled to the defences in Article IV rule 2 (i) of the Hague Rules.[97] What is more, even assuming the contrary, the master and the shipowners would be held to be able to rely on an estoppel by conduct, which would disentitle Dr. Ismail from asserting his legal rights. The appeal was allowed and the award was remitted to the arbitrators to further consideration taking into account the findings of the Court.

[94] Article IV rule 2 (m) states: *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods;"*

[95] Article IV rule 2 (q) states: *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (q) any other cause arising without the actual fault and privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."*

[96] As Lord Justice Ormrod pointed out, *"it would be hard to find a form of words better adapted to promoting disputes between owners and charterers than this"*, because the first part of the clause requires the master to carefully follow the instructions of the charterer with regard to stowage and dunnaging, while the second part leaves him responsible for the proper performance of these operations. See: *Ismail v Polish Ocean Lines (The "Ciechocinek")* – Court of Appeal (Lord Denning, M.R., Lord Justice Ormrod and Lord Justice Shaw) – Lloyd's Law Reports [1976] Vol. 1, p. 489, at pp 497-498.

[97] Article IV rule 2 (i) states: *"Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (i) act or omission of the shipper or owner of the goods, his agent or representative;"*

The other case referring to the words "under the responsibility of the master" was *The "Argonaut"*,[98] which concerned goods that were damaged by the stevedores upon discharge. The case is similar to *"Court Line v Canadian Transport"* in that it involves a charter party clause providing that the charterers are to load, stow and discharge under the supervision of the master, but the clause is modified so as to shift the responsibility for those operations to the latter. The varied wording, particularly the addition of the words *"and responsibility"*, prompted the parties to rely on their interpretation of the classic case *"Court Line v Canadian Transport"* whereas the court, in reaching its decision, eventually found the reasoning in the latter case not fully applicable to the construction of the particular charter party.

On the facts, the plaintiff shipowners (Alianca Bay Shipping) time chartered their vessel *Argonaut* to the defendant charterers (MSC Mediterranean Shipping Company), for one time charter trip from South Africa to Europe. The time charter was in a NYPE form and it contained, *inter alia*, the following clauses:

> *8. . . . Charterers are to load, stow and . . . discharge at their own expense under the supervision* ***and responsibility*** *of the Captain.* [emphasis added]
>
> *31. The Master shall supervise the stowage of the cargo thoroughly and let one of his officers control all loading stowage and discharge of the cargo . . .*
>
> *38. Charterers are not to be liable for any damage . . . unless same is reported by the Master in writing to the Charterer's Agents at the port when and where such damage occurs or as soon as it is discovered.*

Part of the cargo, which the vessel loaded at Durban, was granite blocks that were heavy cargo of 4 to about 20 tons in a square or oblong shape. The ship was then ordered to proceed to the Mediterranean and discharge the blocks first at Sete, France and after that in Marina di Carrara, Italy. During unloading at the first discharge port in Sate, a falling granite block pierced one of the ship's tanks and dented another one. The master procured a written notice to the stevedores and the respective surveys were carried out. Then, the vessel called at Marina di Carrara, where, upon discharging, a falling granite block again pierced the tank top of one of the holds. Shortly after that the charterer's initiated repairing works on the ship but the owners required full repairs before she was redelivered. The matter was referred to arbitration, where the main dispute was whether the shipowners were responsible for damage to the ship done by the stevedores who were employed by the charterers.

The arbitrators found that the master of the ship was not to be blamed for the damage that took place at the first discharge port (Sete). They pointed to the fact that the master and the chief officer were not indifferent about the unsafe method that the stevedores were employing to discharge the cargo. The lack of intervention did not attach blame on the part of the master, for *"stevedores are notoriously unresponsive to*

[98] *MSC Mediterranean Shipping Company S.A. v Alianca Bay Shipping Company Ltd. (The "Argonaut")* – Queen's Bench Division (Commercial Court) (Leggatt J) – 25, 26 February 1985 – Lloyd's Law Reports [1985] Vol. 2, p. 216.

suggestions from ship's officers as to how they should go about their work".[99] With respect to the damage that occurred at the second discharge port (Marina di Carrara), the arbitrators established that the stevedores' careless handling could not have been prevented by closer supervision or control on behalf of the master. However, there was an omission on behalf of the master to provide steel plates to secure the unloading method. Given the fact that at Sete the master already experienced failure upon discharging the same type of cargo, he should have provided for some precautions at the second discharge port. The arbitrators found that should there had been a fail-safe system such as steel plates, damage would have been eliminated or significantly reduced.

As to the interpretation of the charter party clause 8, and in particular the added words *"and responsibility"*, the arbitrators' reasoning commenced from the decision in *"Canadian Transport v Court Line"* case.[100] The added words were found to alter the result reached in the latter case to the effect that they pass to the master a bigger amount of responsibility for bad loading, stowage and discharge. However, in defining the limit of the master's responsibility, the arbitrators rejected the proposition that the words should be construed so as they pass all responsibility to the master for whatever damage caused. Instead, the approach taken during arbitration was that the words *"and responsibility"* in clause 8 of the charter party did not impose a mechanical all-embracing responsibility upon the shipowners. Those words instead were interpreted as to transfer responsibility to the extent that the damage caused is related to a matter that is within the master's province, even when, as it was in the present case, the damage is caused by stevedores hired by the charterers. On the other hand, the master could not be held responsible when the damage is caused by the stevedore's negligence that is not connected whatsoever to the master's supervision and control.

Both parties, the charterers and the shipowners, appealed the arbitration award on the grounds that the arbitrators erred in law. After referring the issue with the *Argonaut* to the Court, the judge also used the *"Court Line v Canadian Transport"* case as a starting point but he refrained from the reasoning applied there as one that is not being apt for the present case. Leggatt J did not embrace the concept of "intervention" contemplated in *"Court Line v Canadian Transport"*, which was additionally defined as a concept in another case with the following: *"the party primarily responsible might be relieved from liability caused by the other party's intervention".*[101] The reason why Leggatt J departed from that reasoning is that in *The "Argonaut"* the primary responsibility for stowage rests with the shipowners, whereas the charterers only have an obligation to load, stow, trim and discharge with due care. That is, in the present case the charterers are not vested with, and thus cannot exercise a right to supervise, which can take the form of an intervention. The hiring of the stevedores by the charterers was not considered by Leggatt J an intervention, either, and that is why the "intervention proviso" was rendered inapplicable to the present case. In other words, the primary

[99] *MSC Mediterranean Shipping Company S.A. v Alianca Bay Shipping Company Ltd. (The "Argonaut")* – Queen's Bench Division (Commercial Court) (Leggatt J) – 25, 26 February 1985 – Lloyd's Law Reports [1985] Vol. 2, p. 216 at p. 218.
[100] See section 4.7.2 above.
[101] Neill LJ in *A. B. Marintrans v Comet Shipping Co. Ltd. (The "Shinjitsu Maru No. 5")* – Queen's Bench Division (Commercial Court) – 12, 13 November 1984 – Lloyd's Law Reports [1985] Vol. 1, p. 568 at p. 575.

responsibility for stowage was conferred by clause 8 of the charter party to the owners and the fact that the stevedores were hired by the charterers could not avail the master in avoiding liability:

> *[I]n a case such as the present, I see no need to ascertain what is "the dominant cause of particular damage". Either a party is responsible for a particular operation (or damage caused by it) or he is not. The exercise of a right of supervision may impinge upon, override or detract from a duty to stow properly; but it is difficult to see why the fact that responsibility is conferred on the owners should have a corresponding effect of limiting the charterers' control of stowage operations.*[102]

Accordingly, Leggatt J upheld the arbitrators' award given in favour of the charterers with regard to the damage that occurred at the second discharge port (Marina di Carrara) but did not uphold the arbitrators' award, which exonerated the master with respect to the damage that took place at the first port of discharge (Sete). The judge acknowledged that the shipowners' responsibility may be implicitly limited to "matters within the power of the master", but these matters exceeded in scope what the arbitrators had contemplated as "the master's province". Therefore, the master could not be absolved from responsibility simply because of the reason that at the first discharge port he had not realized that steel plates had been needed as a precautionary measure.

To sum up, the effect of the FIOS(T) clause in *"Court Line v Canadian Transport"* was that the charterers were relieved from responsibility regarding loading, stowing and discharge only to the extent that the master, by exercising his right to supervision, limits the charterers' control over these operations (*i.e.* he intervenes), in which case the master limits *pro tanto* their liability as well. On the other hand, the modified FIOS clause in *The "Argonaut"*, containing the words *"and responsibility"*, conferred the prime responsibility for loading, stowing and discharging upon the shipowners, from which they could be exonerated only for damage that the master cannot avoid by exercising his powers of supervision and control.

4.4.3.2 A transfer of costs or a transfer of risk?

"C.H.Z. Rolimpex v Eftavrysses Compania Naviera S.A." (*The "Panaghia Tinnou"*)[103] is another case involving, among others, the responsibility for stowing and the master's right to supervise loading and stowing under FIS arrangements. What this case is interesting with is that it further specifies the limit of the master's cargo-related responsibilities under a charter party contract which includes a free-in-and-stowed arrangement. Two points have been raised by the claimant charterers in their attempt to place the responsibility on the master for damage of the cargo because of a wrongful stowage – the first one is that the FIS clause was under the heading "costs"; and the second one, being the contention that the master had both a right and a duty to intervene.

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[102] *MSC Mediterranean Shipping Company S.A. v Alianca Bay Shipping Company Ltd. (The "Argonaut")* – Queen's Bench Division (Commercial Court) (Leggatt J) – 25, 26 February 1985 – Lloyd's Law Reports [1985] Vol. 2, p. 216 at p. 224.

[103] *C.H.Z. Rolimpex v Eftavrysses Compania Naviera S.A. (The "Panaghia Tinnou")* – Queen's Bench Division (Commercial Court) (Steyn J) – 28 April 1986 – Lloyd's Law Reports [1986] Vol. 2, p. 586.

The vessel *Panaghia Tinnou* was voyage chartered by her disponent owners Eftavrysses Compania Naviera S.A. to the charterers C.H.Z. Rolimpex for the carriage of 7000 tons of bagged oil cakes from India to Poland. The Nuvoy 1964 form contained, *inter alia*, the following clauses:

> *4. Vessel to be cargo battens fitted, otherwise owners to supply dunnage wood and kraft paper to Shippers'/Charterers' satisfaction before commencement of loading. Bags to be protected against getting in direct contact with steel parts of the vessel.*
>
> *8. Loading . . . (d) cost free in and stowed – see clause 18 (c); (e) dunnage for owners' account; . . . (g) stevedores appointed by charterers.*
>
> *18. Cost . . . (c) Free in and stowed – The charterers shall load and stow the cargo free of any expense whatsoever to the owners. . .*
>
> *19. Dunnage. (a) For Owners account – the Owners shall provide and pay for all dunnage material required for the proper stowage and protection of the cargo.*

Although the oil cakes had to be carefully stowed because they were prone to self-heating, the stevedores, who were appointed by the charterers, loaded and stowed the cargo in an entirely improper manner – no ventilation, insulation or protection from condensation and from heating surfaces was provided. The master was aware of the way the goods had been stowed but did not protest. During the voyage the cargo spontaneously caught fire and suffered damage. The charterers wanted to recover their losses and took the dispute to arbitration where they were given only nominal damages by the arbitrators, who referred the case to the Court.

With regard to the issue who is the responsible party for bad stowage under the charter party, Steyn J reiterated that under common law the responsibility to stow the goods rests with the shipowners but he also relied on the *"Pyrene v Scindia"*[104] and *"Renton v Palmyra"*[105] decisions in that under the Hague and Hague-Visby Rules the owners and charterers were at liberty to choose which party will perform and be responsible for the loading and stowing of the goods. To that effect, the parties in the present case availed themselves of that freedom of contract by means of clause 18 of the charter party, which provided for free in and stowed terms.

Two important points were raised by the charterers to the effect that the FIS clause was qualified and negated. The first one was that the FIS clause was under the heading "Costs", which could suggest that the provision transferred from the owners to the charterers only the responsibility to pay for these operations but not the responsibility for properly and carefully performing loading and stowing. However, Steyn J ruled that the obligation set in clause 18(c) could not be qualified simply by the heading of the FIS clause itself and, thus, the charterers remained under the responsibility to load and stow the oil cakes.

The second point was that clause 4 required the shipowners to provide dunnage to the shippers'/charterers' satisfaction, which was suggested to qualify the FIS terms in

[104] See section 4.1 above.
[105] See section 4.2 above.

clause 18(c). This provision was found by the Judge to be irrelevant since no facts were provided for inadequate dunnage, whereas the phrase *"Bags to be protected against getting in direct contact with steel parts of the vessel"* constituted merely an indication to the owners of the amount of dunnage that would be needed, and it did not constitute any stowage obligations for the owners.

It can be inferred that a master does not play a role in the stowage of the goods under FIS terms even when he is under the duty to supply dunnage as far as he does not fail carrying out this obligation. Thus, the primary obligation to load and stow the cargo stayed with the charterers and the provision in clause 18(c) could not be qualified by the "Costs" heading or by the dunnaging obligation set in clause 4.

Steyn J further stated *in obiter* that in principle under a Nuvoy charter party, clause 18(c) can be qualified by other provisions and an example of such an attempt is found in the case examined above *"Ismail v Polish Ocean Lines"*[106]. In that case clause 18(c) was qualified by the controversial typewritten clause *"Dunnaging and stowage instructions given by the charterers to be carefully followed but to be executed under the supervision of the Master and* ***he is to remain responsible for proper stowage and dunnaging****."* [emphasis added]

But even that attempt to qualify the FIS clause in *"Ismail v Polish Ocean Lines"* did not achieve to do so, because the clause was found to be confusing and controversial[107] and was held not to apply; let alone the lack of any relevant clauses that could be able to qualify or negative clause 18(c) in the present case *The "Panaghia Tinnou"*, or the absence of any intervention on behalf of the master within the meaning of the *"Court Line v Canadian Transport"* case.[108] The charterers' contention that the master had both a right and a duty to interfere was struck down and Steyn J reminded that only a possible unseaworthiness of the vessel as a result of poor stowage[109] may

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[106] See section 4.7.2 above.

[107] See Lord Justice Ormrod's judgment at *Ismail v Polish Ocean Lines (The "Ciechocinek")* – Court of Appeal (Lord Denning, M.R., Lord Justice Ormrod and Lord Justice Shaw) – Lloyd's Law Reports [1976] Vol. 1, p. 489 at p. 497: *"It would be hard to find a form of words better adapted to promoting disputes between owners and charterers than this. On the face of it it places the master in the impossible position of being under obligations which are, at least potentially, mutually inconsistent. The first part of the clause requires him to comply with the charterer's instructions as to stowage and dunnaging; the second leaves the responsibility for proper stowaging and dunnaging on him."*

[108] See section 4.7.2 above.

[109] A relevant side note here is that, contrary to that finding of Steyn J. in *The "Panaghia Tinnou"*, Langley J. pointed out in *The "Imvros"* to how peculiar the following interpretation would be: if stowage performed by the charterers is so bad as to risk the vessel's seaworthiness, then the responsibility will shift to the shipowners, meaning that the worse the stowage is performed by the shippers, the better for the shippers because the more likely it is that they will escape liability (*The "Imvros"* [1999] 1 Ll.L.Rep. 848 at p. 851). On that basis, the judge in *The "Imvros"* supported the shipowners' contention that the duty of seaworthiness under the charterparty was not breached notwithstanding that the charterer's bad stowage in effect risked the vessel's seaworthiness. In other words, the owner's right to intervene to prevent the vessel from becoming unseaworthy because of poor stowage was not tantamount to a duty and, accordingly, did not trigger liability on the part of the shipowners for not intervening and, at the same time, it did not relieve the charterers from liability. Finally, *The "Eems Solar"* has provided a conclusive answer to the problem of FIOS(T) clauses and a vessel's unseaworthiness caused by the charterer's poor stowage: *"the shipowner [under a FIOS clause] will not be liable for damage arising from improper stowage even if it renders the vessel unseaworthy unless it is established that the bad stowage leading to the damage arose from a significant intervention by the shipowners [where] "intervention" must be significant in the sense that it operate so as to tie the stevedores' hands and was caused only by the captain's orders or was the result of matters of which the captain was, but the charterers were not, aware."* (see section 4.3.2 above) For the duty of the master to intervene under a FIOS clause if poor stowage threatens the ship's seaworthiness, see: Dr.

have given rise to a duty on behalf of the master to intervene, whereas no such findings of unseaworthiness were present; nor did the master or the chief officer know of any characteristics of the cargo and nor did they know that the stowage was not proper. Accordingly, the charterer's obligation to stow the cargo was not qualified and the latter was liable for the damage caused as a result of poor stowage.

4.4.4 Exemption under Article IV rule 2(i) of the Hague-Visby Rules

As seen above, when the cargo owners (either shippers or consignees) perform the operations of loading or discharge but the risk and responsibility stays with the carrier, the latter may seek exemption under Article IV rule 2(i) of the Hague-Visby Rules, which provides liability exemption in case of act or omission on the part of the shipper or owner of the goods.

To the extent that the Rules are incorporated into a charter party, the shipowner may also seek exemption from liability under the same provision for the charterer's negligence in loading or discharging which operations, under the FIOS(T) clause, are the responsibility of the shipowner.[110] This, however, depends on the fact whether the charterer is also an owner of the cargo. If this is so, then he may have recourse to Article IV rule 2(i). On the contrary, where there are three parties involved – the shipowner, the charterer, and the cargo owner – then the charterer is neither a shipper, nor a cargo owner. In this situation, it is held that the shipowner cannot resort to the respective provision of the Rules. Case law has rejected any attempt to adapt the meaning of the Rules to fit to the circumstances under such a charter party so that the reference to "the shipper or owner of the goods" in Article IV rule 2(i) HVR could be taken as a reference to the charterer.[111] As Dillon L.J. unambiguously stated: *"Where […] there are three parties and the charterer is not the shipper or owner of the goods, I can see no reason for doing such violence to the language of art. IV".*[112]

4.5 Summary

The wording of Article III rule 2 is at odds with existing practices in international shipping. Moreover, there are discrepancies among different legal systems as to how to handle this oddity. The recapitulation of the English law cases discussed above points to the general conclusion that a purposive construction of Article III rule 2 prevails over a literal construction, where the former permits the commercial practice of transferring both the performance and the responsibility for loading, handling, stowing and unloading the cargo.

The early cases of *"Pyrene v Scindia"* and *"Renton v Palmyra"* bestowed upon the parties freedom of contract with respect to the allocation of their cargo-related

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Theodora Nikaki – *'The effect of the FIOS clause of NYPE 1946 charterparties on owners' duty to provide a seaworthy vessel'*, Journal of International Maritime Law, Vol. 13 (2007), Issue 1, p. 29. As the owner's duty to provide a seaworthy vessel stays outside the ambit of the present thesis, this problem will not be addressed in details here.

[110] This will be the case, for example, where the FIOS(T) clause qualified by the words "under the responsibility of the master", or when the FIOS(T) transfers only the physical performance and/or costs for these operations but not the risk for them.

[111] *Filikos Shipping Corporation of Monrovia v Shipmair B.V. (The "Filikos")* – [1983] 1 Lloyd's Law Reports 9.

[112] *Filikos Shipping Corporation of Monrovia v Shipmair B.V. (The "Filikos")* – [1983] 1 Lloyd's Law Reports 9 at p. 12.

obligations under a bill of lading, whereas the standard of performing these duties remains invariable. That is, parties may define in their contract of carriage the scope of the carrier's cargo-related obligations, i.e. they may transfer the responsibility to load, stow, trim and/or discharge. However, the party who has undertaken to perform these duties must do so "properly and carefully". This is so, because English courts applied a purposive approach to Art. III rule 2, rather than a literal reading of the text – they embraced the view that the Rules do not define the *scope* of the obligations of the carrier over the cargo, but they merely refer to the *manner* in which these obligations must be performed. The reason why the decisions in *"Pyrene v Scindia"* and *"Renton v Palmyra"* are paramount to the jurisprudence on the admissibility of FIOS(T) arrangements, is because they allow Courts in further cases to distinguish between, on the one hand, exempting clauses (which are void under Art.III rule 8) and, on the other hand, clauses that define the services to be performed by the contractual parties (which are permissible under the Rules).

The "Jordan II" case essentially applied the approach in the latter two cases and confirmed that free-in-free-out agreements were valid and not stricken down by Art. III rule 8 of the Hague-Visby Rules. The case did not bring a change in the law but contributed to the forging of a well-established jurisprudence, supporting the validity of a FIOS(T) clause, which will be difficult to overturn in the future. Furthermore, the protection afforded to shipowners provided in *The "Jordan II"* case was extended in *The "Eems Solar"* case, where the incorporated charterparty FIOST clause did refer solely to the charterer but did not make an express reference to the shipper or receiver, and nevertheless the Court held this clause to constitute a valid transfer of the obligation to stow from the shipowners to the bill of lading holder.

The study on cases involving free-in-free-out arrangements in charter party agreements explored the extent to which the proviso *"under the supervision of the captain"* is capable of compromising an effective transfer of the obligation and responsibility to load, stow and discharge, when it is inserted in a FIO(S) clause. The *"Court Line v Canadian Transport"* and the following cases examined in *section 4.7* confirmed that a right to intervention on behalf of the master in and of itself is a matter of course, which suggests that the master may intervene even when the words "under the supervision of the captain" are not contained in the respective clause. In this sense, contracting out the shipowner's obligations to load, stow and/or discharge the cargo will not be qualified simply by inserting those words into a FIO(S) clause. In practice, these words alone have no bearing on the apportionment of liability for damaged or loss cargo under a FIOS(T) clause. The transfer of liability for the operations in question will actually be invalidated only when the master, in exercising his right to intervene, actually limits the control of the charterer regarding the performance of the tasks mentioned.

On the other hand, when the abovementioned proviso is worded *"under the supervision and responsibility of the captain"*, the primary responsibility for loading, stowing and/or discharge shifts back to the shipowners but to the extent that the master can possibly avoid the damage by exercising his right to supervise and control the charterers' performance of the cargo-related operations (*i.e.* that the matters are within the "master's province").

Bottom line, the party that is primarily responsible under the FIOS(T) clause for the cargo-related operation can be relieved from responsibility if the damage or loss is caused by the intervention of the other party and this is valid under both types of wording – "under the supervision of the master" as well as "under the responsibility of the master". The difference is that while the former wording is not capable of qualifying the transfer of duties under the FIOS(T) clause, the latter one shifts the risk and responsibility back to the shipowner.

5. The approach taken in the Rotterdam Rules

One of the big challenges to any international convention in the maritime world is to balance between the freedom of contract and the protection of cargo interests. Therefore, commercially-driven exceptions to the strict liability of the carrier, such as FIOS(T) clauses, are an indispensable part in the process of achieving unification of the rules governing carriage of goods by sea. It should not be forgotten that the purpose of FIOS(T) clauses stretches beyond than merely relieving a shipowner from responsibility to perform his duties to load, handle, stow and/or unload the goods. Such a provision does not solely intend to place more obligations on the charterers, shippers or consignees, either. A free-in-free-out arrangement can actually be of charterers' interests since the latter may have better business relationship with the stevedoring companies at the ports of loading and discharge, allowing the charterers to benefit from more profitable stevedoring rates (*e.g.* due to volume rebates) as opposed to the rates offered to shipowners, which will ultimately be incorporated into the freight payable by the charterers.[113] Also, it is very often the case that, for commercial reasons, charterers are better qualified and more familiar than shipowners with the particular characteristics of the cargo shipped and with the precautions that have to be taken during loading or discharge.

The provision in the Rotterdam Rules which statutorily allows the transfer of certain cargo-related obligation from the carrier to the charterer/shipper/consignee is set forth in Article 13.2:

> ***Article 13***
>
> *[…]*
>
> *2. Notwithstanding paragraph 1 of this article, and without prejudice to the other provisions in chapter 4 and to chapters 5 to 7, the carrier and the shipper may agree that the loading, handling, stowing or unloading of the goods is to be performed by the shipper, the documentary shipper or the consignee. Such an agreement shall be referred to in the contract particulars.*

Although the drafters of the Rotterdam Rules expressed their concern that most of the cargo damage in international shipping occurs precisely during loading or unloading the goods,[114] the new Convention allows the carrier and the shipper to agree

[113] Dr. Theodora Nikaki – *'The effect of the FIOS clause of NYPE 1946 charterparties on owners' duty to provide a seaworthy vessel'*, Journal of International Maritime Law, Vol. 13 (2007), Issue 1, p. 29 at p. 38.
[114] UNCITRAL Report of Working Group III (Transport Law) on the work of its twenty-first session (Vienna, 14-25 January 2008), Doc A/CN.9/645, para 44.

that these four tasks mentioned above be performed by the shipper, the documentary shipper or the consignee, who will be the liable party in case of a failure to properly and carefully effect these duties.

Of all the nine tasks enlisted in Article 13.1, the provision allows carriers to contract out the following duties: to load, handle, stow, and unload the cargo. The Rotterdam Rules, thus, recognize the contractual freedom of the parties to agree on who will perform each of the cargo-related duties listed therein. In this regard, Article 13.2 is very close to the English interpretation of Article III rule 2 of the Hague-Visby Rules[115] in a sense that a FIOS(T) clause transfers not only the costs for performing the respective duties but it also transfers the responsibility to perform them, which means that the carrier is essentially contracting out liability.

The derogation introduced by Article 13.2 is subject only to the condition that a free-in-free-out agreement shall be referred to in the contract particulars. Such reference actually represents a FIOS(T) clause, or a variation of it, which shall be incorporated in or ascertainable from the negotiable transport document. By force of Article 58.2, a bill of lading holder other than the shipper will not assume any liability for unloading if the contract particulars do not refer to the consignee's obligation to unload.[116] The rationale behind that strict requirement for incorporation by reference is the protection of the consignee who should be informed and well aware of that contractual arrangement. In view of the definition in Article 1.23 that contract particulars means *"any information relating to the contract of carriage or to the goods (including terms, notations, signatures and endorsements) that is in a transport document or an electronic transport record"*, it can be inferred that the reference required by Article 13.2 should be in writing. The wording of the provision leaves it unclear, however, whether a general incorporation of charter party terms (*e.g.*, "as per charterparty") can qualify for such a reference.[117]

It is important to underline that Article 13.2 allows the carrier to delegate the operations in question only to the shipper, documentary shipper, or the consignee. In case loading, handling, stowing and unloading are performed by some other party, the carrier remains responsible for any failures therein unless these other parties are authorities or other third parties who are required to act by law or regulations within the meaning of Article 12.2, upon which the carrier's responsibility ceases. In addition, by force of Article 17.3 (i)[118] the carrier will still be liable when, under the contract of carriage, any of the loading, handling, stowing, and unloading has been agreed to be performed by the shipper, documentary shipper or the consignee, and nevertheless these tasks are carried out by the carrier or a performing party on behalf of that same shipper,

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[115] See *Chapter II*, section 3.3 *supra*.

[116] Article 58.2 reads: *"A holder that is not the shipper and that exercises any right under the contract of carriage assumes any liabilities imposed on it under the contract of carriage to the extent that such liabilities are incorporated in or ascertainable from the negotiable transport document or the negotiable electronic transport record."*

[117] Yvonne Baatz, Charles DeBattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, Michael Tsimplis – *'The Rotterdam Rules: A Practical Annotation'*, Informa Law (2009), ISBN 1843118246, Chapter 4, p. 36.

[118] Article 17.3 (i) reads: *"The carrier is also relieved of all or part of its liability pursuant to paragraph 1 of this article if, alternatively to proving the absence of fault as provided in paragraph 2 of this article, it proves that one or more of the following events or circumstances caused or contributed to the loss, damage, or delay:*
(i) Loading, handling, stowing, or unloading of the goods performed pursuant to an agreement in accordance with article 13, paragraph 2, unless the carrier or a performing party performs such activity on behalf of the shipper, the documentary shipper or the consignee;"

documentary shipper or the consignee. This provision will be triggered in cases where, for instance, the carrier performs these operations but it is the shipper or consignee who pays for them. It covers also the situation where under a FIO clause the shipper performs loading but the consignee does not perform unloading and it is the carrier who discharges the cargo on behalf of the consignee. Allowing the carrier to perform an operation on behalf of the cargo interests and then escape liability was highly criticized and the Working Group expressed its misgivings about such a proposal.[119] It is the very same reason why the words *"or on behalf of the shipper, the controlling party of the consignee"* dropped out from draft Article 13.2. To sum up, the carrier will be relived from liability when he delegates the duties in question not only upon compliance with Article 13.2 but also when it is not him or his employees who in fact performs these duties.

Equally important, Article 13.2 was a subject to a considerable debate within the Working Group, in particular, because it was feared that such a provision could be used in an abusive manner by shipowners in an attempt to escape liability for cargo that was damaged upon loading, stowing or discharging:

> *[Paragraph 2] deviated for instance from the Hague-Visby Rules. It was also said that such an innovative provision should be amended so as to preclude carriers from routinely disclaiming liability for damage to the goods that occurred during the operations contemplated in the draft article. The potential risk involved in abuse of those clauses was said to be significant. Another concern raised in connection with paragraph 2 was that it was not clear whether and to what extent the types of clauses it contemplated would affect the carrier's period of responsibility. There was strong support for the deletion of paragraph 2 so as to solve those problems.*[120]

It is relevant to point out that the UNCITRAL adapted the particular draft article to ensure that those misgivings would not be justified. Therefore, inserting a FIOS(T) clause in a contract of carriage under the Rotterdam Rules does not limit the period of responsibility of the carrier, which was actually one of the main concerns of the UNCITRAL delegations in the Working Group during the drafting of the Rules.[121] The fear of some delegations to that effect even led to a proposal that the second sentence of Article 13.2 should have been understood as a reference to a separate agreement between the parties thereto and not part of the original contract.[122] However, not enough support was accumulated for such an amendment of this second paragraph.

Why was the period of responsibility so important to the delegations during the negotiation process? The answer to that question lies in the result which the Rotterdam Rules achieved by not reducing the carrier's period of responsibility under a FIOS(T) clause that is, a carrier will still be held responsible during loading and unloading for

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[119] Working Group III (Transport Law), 9th session (New York, 15-26 April 2002) – UNCITRAL Report of the Working Group on Transport Law on the work of its ninth session, p. 37, para 121.
[120] Working Group III (Transport Law), 21st session (Vienna, 14-25 January 2008) – UNCITRAL Report of the Working Group (Transport Law) on the work of its twenty-first session, para. 44.
[121] Working Group III (Transport Law), 21st session (Vienna, 14-25 January 2008) – UNCITRAL Report of the Working Group (Transport Law) on the work of its twenty-first session, para. 47.
[122] *Ibid.*

other matters that stay outside the contractually negotiated transfer of responsibilities. An example of such a responsibility is the duty of care regarding the goods.

In conclusion, the proviso in Article 13.2 is important for unification of law because it made clear that FIOS(T) clauses are valid under certain circumstances and that they not only transfer the costs for loading, handling, stowing and unloading from the carrier to the cargo interests but they also transfer the responsibility for the proper and careful execution of these duties. What is more, the drafters found the right balance between carriers' and shippers' interests by leaving the processes of loading and unloading under such a clause within the period of responsibility of the carrier. In this way the Rotterdam Rules clarified an area of shipping law which was unclear and not equally interpreted in different jurisdictions, while in the same time the Rules adequately considered nowadays commercial practices.

6. Conclusion

The architecture of the Hague-Visby Rules, in particular Article III rule 2 and Article III rule 8, makes it look on the surface that any clause, which limits the cargo-related responsibilities of the carrier, is null and void. However, it was evidenced that English courts tend to move away from such literal construction of the Rules. One obvious reason for courts being reluctant to ban the FIOS(T) clause is that such an outcome would lead to absurd results where a shipper who, following an existing commercial practice, carries out loading and stowing, could then hold the carrier liable for the shipper's own failure to fulfil his contractual obligations.[123]

Secondly, a literal construction of Article III rule 2 combined with Article III rule 8 was not in line with the object of the Rules as outlined in *Renton v Palmyra.*[124] This is confirmed also by the Travaux Préparatoires of the Hague Rules. At the Diplomatic Conference held in 1923, the chairman of the sub-committee Mr. Louis Franck noticed in respect of Article III rule 2 the following: *"Article III(2) contained an essential clause [...] [which prevents] the inclusion of every clause permitting the shipowner, without incurring responsibility, to fail in this essential duty of overseeing the preservation of the goods from the point of view of successful stowage, loading, and unloading […]. That was the main element of the convention because it was in this way that, in the past, the use of immunity clauses had given cause for the greatest criticism."*[125] The latter sentence is very indicative of the intention of the drafters – the rule is aimed at preventing immunity clauses which would exonerate carriers from liability for non-fulfillment of the obligations Article III rule 2. However, the drafters do not seem to have had in mind to ban an existing and common commercial practice to delegate contractually some of the cargo-related tasks from the carrier to the shipper. It is unlikely that the object of the Hague/Hague-Visby Rules is to create provisions that go against commercial practices

[123] N.J. Margetson – *'Liability of the Carrier Under the Hague (Visby) Rules for Cargo Damage Caused by Unseaworthiness of Its Containers'*, (2008) 14 JIML 153, at p. 159.
[124] *Renton v Palmyra (The "Caspiana")*, [1956] 2 Lloyd's Law Reports 379 at p. 390.
[125] Comité Maritime International – *'The Travaux Préparatoires Of The International Convention For The Unification Of Certain Rules Of Law Relating To Bills Of Lading Of 25 August 1924 The Hague Rules And Of The Protocols Of 23 February 1968 And 21 December 1979 The Hague-Visby Rules'*, p. 186.

commonly carried out by shipowners, shipper, bankers, and insurers. Accordingly, English courts did not see such a clause as an immunity clause and preferred a purposive construction over a literal one. In other words, their approach and interpretation of the Rules with regard to the FIOS(T) clause was based on purpose rather than cause.

However, as it was established above, all FIOS(T) clauses are usually strictly scrutinized by courts even in jurisdictions where free in-free out arrangements are permitted. This also has to do with the object of the Rules – there must be a balance of the interests of carriers and cargo interests. Therefore, if the clause leaves both parties on an equal footing, for example the consignee has knowingly consented to such an arrangement, then the clause is less likely to be struck as being contrary to Article III rule 8 and, thus, null and void.

Chapter IV
The Carrier's Obligations over Deck Cargo

1. Introduction

The current chapter will focus on the obligations of the carrier under the Hague/Hague-Visby Rules over cargo that is carried on deck. Particular attention will be paid on the relationship between carriers and cargo interests in matters related to such cargo, and also between shipowners and charterers, as well as on the legislative and judicial issues that arise in the various situations of deck carriage.

The discussion will be begin with a concise description of the notions "deck" and "deck cargo" (*section 2*), followed by the position on deck carriage under the Hague/Hague-Visby Rules (*section 3*), which forms the current regulatory framework. The current law on deck cargo (*section 4*) will be stated, while carrying out a risk analysis related to deck carriage taking into account factual and technical data. In particular, the risk assessment will attempt to "measure" the evolved views on deck carriage; secondly, the changes in ship design and their impact on the carriage on deck will be analyzed; thirdly, the advent of containerization will be referred to so far as it has affected the traditional deck cargo doctrine; finally, it will be observed how the changes in the views relating to deck cargo have affected the traditional notion of a custom to carry on deck, the required agreement to carry on deck, and the statutory obligations of the carrier to do so. The emphasis in this section will be put on how technology, innovations, and modern shipping practices have changed the views on deck cargo and have widened the gap with the existing statutory rules.

Furthermore, the evolving views on deck cargo will be examined (*section 5*) as, like in the previous chapters, the focus will be primarily on English law, which is distinctively restrictive to deck cargo. This detour is to show how courts have interpreted this aspect of the carriage of goods throughout the years in the light of the old doctrine becoming increasingly incompatible with the current shipping practices. The particular issues that will be addressed will be the relation between the various deck cargo provisions and the carrier's obligations over the cargo under the Rules as well as problems related to deck cargo provisions coupled with a FIOS(T) clause.

The next section is dedicated to how the carriage of goods on deck is treated in other jurisdictions (*section 6*) and to what extent they have adapted to the evolving law on deck carriage.

Finally, the approach towards the carriage on deck under the Rotterdam Rules is examined (*section 7*), with a commentary on the feasibility of such provisions and on

whether they could be applicable against the background of the changed views on deck carriage.

2. What is deck cargo?

The carriage of goods on deck is a specific way of transporting goods on a sea vessel and, therefore, it is treated and regulated differently compared to cargo stowed below deck. In broad terms, deck cargo designates cargo that is carried in any space that is uncovered on the weather deck of a ship instead of being carried inside the ship.[1] If the cargo is stowed in a permanent steel enclosure, even if this location is designated in the plans of the shipbuilder as above the weather deck (*e.g.* a hatch-trunk, a bridge deck, or a hospital space), the cargo is nevertheless considered to be carried below deck.[2] A definition of a deck was to be found in the CMI's early instrument on general average, the York Rules (1864), and in its successor the York & Antwerp Rules (1877), both of which are now superseded by new revisions of those Rules. The relevant article reads:

> ***Rule I – Jettison of Deck Cargo***
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> *[…]*
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> *Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.*

A definition of deck carriage can be derived from the W. Tetley's description of "under deck" citing *Lossiebank (Massce & Co. Inc. v Bank Line) 1938 AMC 1033 (Sup. Ct. of Cal. 1938)*: *"Under deck means not exposed to the elements; in other words, the cargo is completely protected by the ship's structure".*[3]

What makes it so peculiar and distinct to carry cargo that way, is that the goods stowed on deck are not protected by the ship's structure like those goods that are carried below deck. Thus, shipments on deck are directly exposed to adverse elements such as bad weather conditions, be it heavy rains and high winds, snow, due or haze; seawater splashing aboard; uncontrolled temperature as well as scorching heat due to direct sunlight. The risk of damaging such cargo or losing it overboard during carriage is, therefore, substantially greater. So is the risk of the vessel being damaged or rendered unseaworthy because of poorly stowed or lashed cargo, which is shifting and rolling across the weather deck. Therefore, shipowners who are carrying deck cargo are often advised to avoid, as much as possible, adverse weather conditions and perils of the sea that can be foreseen, while still maintaining the interests of charterers and cargo owners.

It may seem thus far that carrying goods on deck is unreasonable because no party has an interest in taking more risks and additionally endangering the cargo carried by exposing it directly to the perils of the sea. Yet, cargo has been and is still carried on deck either in break bulk,[4] or in containers,[5] or as a project cargo[6] – in the

[1] The carriage below deck is also known as 'belly cargo', although that term is typical for air cargo and it is rarely used in sea transportation.
[2] Arnold W. Knauth – *'The American Law of Ocean Bills of Lading'*, Third Edition (1947), p. 194.
[3] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), Volume 1, Chapter 31, p. 1569.
[4] This can be, for instance, timber cargo or concrete blocks carried on deck.

latter case the cargo is usually lashed directly to the deck of the ship, carefully balanced for safety of the vessel, and sometimes covered with materials for protection of the cargo. The reasons why contractual parties may agree on a carriage on deck vary inasmuch as the deck cargo itself – from explosives to lumber and cattle.[7]

Firstly, for some cargoes there are requirements imposed by law to be carried on deck. This is especially the case with the transportation of hazardous cargoes, which should be in compliance with the IMDG Code.[8] The Code distinguishes between 5 stowage categories and some of them are restricted to stowage on deck only.[9] Also, some dangerous goods are not allowed to be discharged and stored in a warehouse at the port of destination and that is why they have to be discharged and transferred directly from the deck of a docked ship to waiting container trucks or trains so that this cargo can immediately leave the port.[10]

For other cargoes, deck stowage may be necessitated by technical requirements and convenience. Various out-of-gauge cargoes that need more space, may not fit in the cargo hold of the ship, or may not go through the hatches, and, therefore, they need to be stowed on deck. Such cargo may include aircrafts, trucks, locomotives, coaches, windmills, huge critical pieces of equipment, and detached parts of bigger machinery.

There may also be commercial considerations for the carriage of goods on deck and these are related to the space aboard the vessel and the carrier's pursuit to maximize profits. Deck carriage, on the other hand, may be preferred by sellers or buyers of the goods, too, simply for efficiency reasons. Cargo stowed on deck is generally more quickly and easier to load and discharge.

3. The position under the Hague/Hague-Visby Rules – deck carriage as an exception to the Rules

The carriage of goods on deck is yet another exception to the Hague/Hague-Visby Rules. The regulation of deck cargo has deliberately been left out of the scope of the Rules because such cargo has traditionally been seen as potentially hazardous in

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[5] For containerized cargo, see *Chapter V*.

[6] Project cargo is a general term broadly describing large, bulky and heavy cargo that cannot be transported in a container. These may be cranes, wind power plants, various kinds of turbines, and ship propellers.

[7] Although livestock carriage often takes place on deck for safety and ventilation reasons, this type of carriage, being an exception to the Hague Rules and the Hague-Visby Rules (*Art .I(c)*) regardless whether on deck or below deck, is beyond the scope of the current thesis.

[8] The International Maritime Dangerous Goods (IMDG) Code is a uniform international code for the transport of dangerous goods and marine pollutants by sea, written under the auspices of the International Maritime Organization (IMO). The Code contains mandatory instructions on terminology, packaging, labeling, placarding, markings, stowage, segregation, ventilation, handling, training of shore-based personnel, and emergency response. It covers cargo that is considered dangerous due to its flammable, corrosive, poisonous or other hazardous nature and properties. The IMDG Code, which supplements the principles laid down in the SOLAS and MARPOL conventions, has been changed and updated every two years in order to keep pace with the shipping industry. The Code's latest edition is the IMDG Code 2014 (Amendment 37-14).

[9] See *IMDG Code Section 7.1.3*.

[10] For example, substances liable to spontaneous combustion (*IMDG Code, Class 4.2*), and also some oxidizing substances (*IMDG Code, Class 5.1*) such as barium permanganate (UN 1448), potassium chlorate (UN 1485), sodium chlorate (UN 1495), zinc chlorate (UN 1513), and ammonium nitrate (UN 1942), are allowed only on the basis of direct discharge by the South Africa's Transnet National Port Authority (TNPA).

comparison with cargo carried below deck.[11] In America, for example, the exclusion of deck cargo from the application of the US COGSA 1936 was explained with the need to relieve the Baltic timber trade from regulation by giving them more freedom of contract.[12]

The exclusion from the scope of the Rules is defined in a rather technical way. Cargo which is stated in the contract of carriage as carried on deck and which is indeed so carried is excluded from the scope of the Hague/Hague-Visby Rules. Although excluded from the Rules, however, deck cargo may well be regulated under national law.[13] Unless the on-deck carriage is excluded from the ambit of the Rules, there is a breach of the carrier's implied obligation to carry the goods below deck. This is the conclusion inferred by reading together Article I(c) and Article III rule 8. While the former provision excludes deck cargo from the definition of goods to which the Rules apply, the latter forbids parties to contract out from the Rules or to lessen their liabilities as laid down therein.

> ***Article I***
>
> *In these Rules the following words are employed, with the meanings set out below:*
>
> *[…]*
>
> *(c) 'Goods' includes goods, wares, merchandise, and articles of every kind whatsoever* ***except*** *live animals and* ***cargo which by the contract of carriage is stated as being carried on deck and is so carried*** [emphasis added].

The definition is clearly drafted to encompass within the ambit of the Rules any possible kind of property that can be carried by sea with two exceptions: live animals and deck cargo. Because of the specific risks that these two categories pose during transportation, they are distinguished from the other types of cargo and are taken out of the liability regime established by the Hague/Hague-Visby Rules. Instead, freedom of contract will apply to the carriage of these categories, subject to the mandatory provisions of the applicable law. Therefore, cargo that is stated to be carried on deck and is so carried is exempted from the provisions of the Hague-Visby Rules (unless the parties expressly chose to contractually incorporate the Rules), and carriers can protect themselves from exposure to liability through inserting in their contract of carriage various exception and limitation clauses, which would otherwise be invalidated by Article III rule 8 of the Hague/Hague-Visby Rules.

The exclusion of deck cargo from the Rules is based on the following interpretation of the Hague/Hague-Visby Rules' provisions. Since "deck cargo" is not considered "goods" within the definition provided (Article I(c)), the bill of lading does not refer to the carriage of goods and, hence, it does not refer to a contract of carriage within the meaning of the Rules (Article I(b)). The provisions of the Rules do not, therefore, apply to such a contract of carriage of deck cargo, because the Rules *"shall apply to every*

[11] Simon Baughen – *'The Perils of Deck Cargo (The Imvros)'*, Lloyd's Maritime and Commercial Law Quarterly (2000), p. 295.
[12] Arnold W. Knauth – *'The American Law of Ocean Bills of Lading'*, Third Edition (1947), p. 193.
[13] See section 8 below.

bill of lading ***relating to the carriage of goods****"* (Article X; emphasis added). This interpretation is also upheld and confirmed in *The "BBC Greenland"*.[14]

However, the mere stowage and carriage of goods on the weather deck of a vessel do not necessarily make these goods "deck cargo" within the meaning provided in the Rules. If one looks closely into Article I(c), it could be seen that there are two conditions that need to be satisfied in order goods to be considered "deck cargo" and, hence, to be excluded from the scope of the Convention. The first one is the presence of an express statement that goods are loaded and carried on board, which must be unequivocally inserted on the face of the bill of lading. The second condition is that the goods are actually so carried. While the second requirement is a matter of fact, the first one is a matter of contract and it is this first condition that has been the cause for many disputes and has given rise to various issues before courts.[15] The rationale behind such a strict requirement for an express written statement in the contract of carriage is that, absent such a statement, the carrier will be unable to prove the agreement that he made with the shipper that the cargo would be carried on deck. The express, genuine and clear written consent of the shipper, on the other hand, is needed because, once the shipment is exempted from the Hague-Visby Rules, the parties lose all their rights and defences under the Convention. It is very important that the shipper was sufficiently informed and that he unequivocally agreed on such terms of carriage.

3.1 Deck carriage performed within the ambit of the Rules: undeclared (unauthorized) stowage on deck

Considering the abovementioned observations, the Rules will still be applicable if there is an express statement or notation on the face of the bill of lading but the goods have been, nevertheless, carried below deck. This is simply because the second, factual condition in Article I(c) has not been fulfilled. An important remark is that the Rules will still apply even when declared deck cargo (meaning that goods are stated as carried on deck and are so carried) has been for some part of the voyage carried on deck, but then re-stowed under deck.[16] A pertinent question is at what point of time does the application of the Rules start – do the Rules apply as of the initial loading of the goods on deck, meaning that they shall apply retrospectively, or do they apply only as of the time when the goods were re-stowed? The view expressed by the authors of *'Voyage Charters'* and by those of *'Carver on Bills of Lading'* supports the latter proposition, namely that the Rules apply as of the moment when the goods are re-stowed below-deck because this is the moment when these goods become "goods" within the meaning of Article I(c), whereas it has been underlined that the definition of "contract of carriage" in Article I(b) has been limited by the words "in so far as such document relates to the carriage of goods by sea", which indicates that during the time when the declared deck cargo is carried on deck, up until the re-stowage below deck, the cargo does not fall within the definition of

[14] *Sideridraulic Systems SpA and Another v BBC Chartering & Logistic GmbH & Co KG (The "BBC Greenland")* – [2012] 1 Lloyd's Law Reports 230, at p. 232, para 2.
[15] *The Rhone: Analysis and Comments*, JIML 12 [2006] 1 13, at p.14.
[16] Julian Cooke, Timothy Young QC, John Kimball, LeRoy Lambert, Andrew Taylor, David Martowski – *'Voyage Charters'* (4th Edition, 2014), Chapter 85, para 85.75.

"goods" and, therefore, the Rules are not applicable.[17] They become applicable after the goods are re-stowed below deck, when the cargo actually becomes "goods" within the meaning of Article I(c). The same principle would apply *vice versa* – when the declared deck cargo was initially loaded and carried under deck, and then, at a later stage during the voyage, re-stowed on deck. In this case, the Rules are applicable only with regard to the first part of the voyage when the cargo is considered "goods" within Article I(c), and they do not apply once the declared deck cargo is re-stowed on-deck.

This principle does not run contrary to the *'tackle to tackle'* scope in Article I(e) because "loading" of the goods, within the meaning of that article, can be considered to be the re-stowing of the cargo below deck; or, in the second scenario, the "discharge" of the cargo can relate to the re-stowing of the goods on deck. The re-stowage itself, below or above deck, may constitute a breach of the contract of carriage but it may well not be a breach, depending on the terms of the contract, the nature of the goods carried, the nature of the stowage and lashing as well as on the specific circumstances and the parties' intention. However, any re-stowage during a voyage should be performed "properly and carefully" in accordance with the obligation set forth in Article III rule 2 of the Rules.[18]

Furthermore, the Rules will also apply when part of the cargo is stowed on deck and another part is stowed below deck, without making it clear in the notation on the bill of lading precisely which part of the cargo will be stowed on deck.[19] The problems that can arise in this case are associated with the identification of the cargo that will be carried on deck and that, accordingly, will bear higher risks. The cargo interests, thus, cannot determine the value of the cargo carried on deck, and cannot assess the pertaining risks; neither can they make an informed consent that the cargo will be carried on deck. Therefore, and also in the light of *The "Rhone"*, it seems that unless the consignments of on-deck and below-deck cargo are separate, or unless the notation on the face of the bill of lading is clear as to exactly which part of the cargo will be stowed on deck, the Hague/Hague Visby Rules will be applicable to the entire shipment, and none of the goods carried will be considered "deck cargo" within the meaning of Article I(c).[20]

All things considered, it is important to note that, throughout this chapter, the term "deck cargo" is used by the author merely to signify the fact that the goods are actually located on the deck of a sea vessel; *i.e.* the natural meaning of the words is employed. In cases where reference has to be made to the Hague/Hague-Visby Rules' definition of "deck cargo", this is explicitly stated, or, else, the words

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[17] See: Julian Cooke, Timothy Young QC, John Kimball, LeRoy Lambert, Andrew Taylor, David Martowski – *'Voyage Charters'* (4th Edition, 2014), Chapter 85, para 85.75; and Sir Guenter H. Treitel Q.C., Francis M.B. Reynolds Q.C. – 'Carver on Bills of Lading' (2nd Edition, 2005), Chapter 9, para 9–116. However, see an opposing view in *'Scrutton on Charterparties and Bills of Lading'* (20th Edition, 1996), Chapter XX, p. 424, where the authors "prefer the view that, when once the contract has become a *"contract of carriage"* within the meaning of this Rule [Art. I(b)], the Rules apply and relate back to the beginning of the carriage of the good, *i.e.* the beginning of the loading."

[18] Julian Cooke, Timothy Young QC, John Kimball, LeRoy Lambert, Andrew Taylor, David Martowski – *'Voyage Charters'* (4th Edition, 2014), Chapter 85, para 85.75 (*ibid.*)

[19] *'Carver on Bills of Lading'* (2nd Edition), Sweet & Maxwell Ltd (2005), London, p. 558, para 9–116.

[20] *Timberwest Forest Ltd v Gearbulk Pool Ltd (The "Rhone")* – 2003 BCCA 39 (Court of Appeal for British Columbia) – Lloyd's Maritime Law Newsletter [2005] 681, p. 2. See: Section 5.3 *infra*.

"authorized/declared deck cargo" are used. Conversely, the opposite term "unauthorized/undeclared deck cargo" or "wrongful deck carriage" is used to indicate that goods have been stowed and carried on deck but that they do not qualify for "deck cargo" within the meaning of the Hague/Hague-Visby Rules. In that regard, while some authors draw a distinction between "undeclared deck carriage" and "unauthorized deck carriage[21] (the former designating cargo shipped on deck under a "liberty to stow on deck" clause[22] but without a statement or notation on the bill of lading stating whether the cargo is actually carried on deck, and the latter relating to cargo carried on deck without any clause permitting deck-carriage and any statement or notation on the bill of lading), the two terms will be employed in the current thesis as synonyms, which generally describe cargo carried on deck that fail to satisfy the requirements of Article I(c) to be excluded from the Hague/Hague-Visby Rules. The same applies *mutatis mutandis* to the terms "declared deck cargo" and "authorized deck cargo".

3.1.1 Clause Paramount

The Hague/Hague-Visby Rules may be applicable to authorized carriage on deck as well. This is achieved through a Clause Paramount[23], which will incorporate the Rules under Article X(c).[24] But then these Rules, once incorporated in the contract of carriage, will apply to cargo which is stated as being carried on deck and is so carried, which renders the Rules inapplicable by force of the very same Rules. This conundrum is particularly addressed by authors and it is underlined that when the Hague-Visby Rules are incorporated in an on-deck bill of lading, it is very important that parties expressly exclude the provision in Article I(c) which excepts deck cargo from the Rules.[25] This is also noted in English legislation, where contracts that provide for deck carriage and in the same time incorporate the Rules, are indeed subject to the Hague-Visby Rules, ignoring the exception for deck cargo:

> *If and so far as the contract contained in or evidenced by a bill of lading or receipt within paragraph (a) or (b) of subsection (6) above applies to deck cargo and live animals, the Rules as given the force of law by that subsection shall have effect as if Article I (c) did not exclude deck cargo and live animals.*
>
> *In this subsection 'deck cargo' means cargo which by the contract of carriage is stated as being carried on deck and is so carried.* [26]

What is more, this article goes beyond the mere statutory solution of the problem caused by inserting a Clause Paramount into an on-deck bill of lading. The way it is drafted, the provision suggests that, under English law, *any* authorized carriage of cargo

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[21] See: James B. Wooder – *'Deck Cargo: Old Vices and New Law'*, 22 J. Mar. L. & Com. 131 (January 1991); R. Glenn Bauer – *'Deck Cargo: Pitfalls to Avoid Under American Law in Clausing Your Bills of Lading'*, 22 J. Mar. L. & Com. 287 (April 1991).

[22] See section 4.3 below.

[23] For the Clause Paramount, see *Chapter I*, section 2.1.3.

[24] Article X: *"The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if […] (c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract".*

[25] James B. Wooder – *'Deck Cargo: Old Vices and New Law'*, 22 J. Mar. L. & Com. 131 (January 1991), at p. 133-134.

[26] UK COGSA (1971), section 1(7).

on deck, to which the Hague-Visby Rules applicable through a Clause Paramount, will be governed by the Rules as if they have the force of law:

> *Without prejudice to Article X(c) of the Rules, the Rules shall have the force of law in relation to:*
>
> *a) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract […]*[27]

Thus, contractual incorporation of the Rules, in particular in cases of deck cargo, has the same effect and the same outcome as if the Rules apply by force of law.

For a General Paramount Clause to effectively incorporate the Rules into the contract of the carriage that involves deck cargo, it is not sufficient that the clause is only included in the bill of lading but it must also expressly refer that it applies to deck carriage as well. A sole Clause Paramount will incorporate the Rules when goods are carried below deck but it will not extend the Rules to cases of carriage above deck.[28] In other words, the clause does not supersede the exclusion of a deck carriage from the scope of the Rules under Article I(c). Conversely, a Clause Paramount will incorporate the Rules in a contract of carriage of deck cargo if it expressly shows that the parties indeed agreed that the Rules will be applicable to the on-deck carriage.[29] An incorporation of the Rules will, thus, be successful with the insertion, for example, of the following clause:

> *2. General Paramount Clause*
> *The Hague Rules contained in the International Convention for the Unification of Certain Rules relating to bills of lading, dated Brussels 25th August 1924 as enacted in the country of shipment shall apply to this contract.*
>
> *9. Live animals and deck cargo*
> *shall be carried subject to the Hague Rules as referred to in clause 2 hereof with the exception that notwithstanding anything contained in clause 19 the carrier shall not be liable for any loss or damage resulting from any act, neglect or default of his servants in the management of such animals and deck cargo.*[30]

3.2 Deck carriage performed outside the ambit of the Rules: declared (authorized) stowage on deck

If cargo carried on deck complies with the two requirements of Article I(c), namely that it is stated as being carried on deck and is so carried, then such carriage is no longer within the ambit of the Hague or Hague-Visby Rules but, instead, it is subject to freedom of contract. Thus, the carrier's responsibility will, in general, be the same for goods stowed below deck and for goods stowed on deck. What is more, in the case of "deck cargo" within the meaning of Article I(c) of the Rules, the parties to the contract of carriage are at liberty to negotiate their own terms and conditions and to determine their liability and obligations, or to choose another liability regime, which would

[27] UK COGSA (1971), section 1(6).
[28] See: *The "BBC Greenland"* [2012] 1 Lloyd's Law Reports 230.
[29] See: *The "Tilia Gorthon"* [1985] 1 Lloyd's Law Reports 552.
[30] *The "Tilia Gorthon"* [1985] 1 Lloyd's Law Reports 552, at p. 553-554.

otherwise not be applicable. In particular, the carrier may invoke contract clauses that, otherwise, would be contrary to the Rules and, thus, struck by Article III rule 8. Another consequence of the exclusion of the application of the Rules is that on-deck carriage of cargo, other than cargo carried in the regular containerized trade where the Rules are in practice rendered contractually applicable,[31] will be rendered subject to national law, which differs quite a lot from one country to another.[32] Accordingly, the admissibility of any contractual provision exculpating the carrier for damage or loss to deck cargo will be assessed depending on the applicable national law.

Considering the foregoing, the most natural consequence for a carrier is to be tempted to insert in the bills of lading clauses that exempt him from all liability whatsoever not only with regard to the "deck cargo" but also with regard to negligence and seaworthiness. However, such clauses are not always welcomed by courts. It is common knowledge that English courts, for example, tend to afford more leeway to parties to shape their contractual relationship, whereas courts in the US tend to be more restrictive when it comes to freedom of contract. If we apply this division to deck carriage, the result is that a clause exempting the carrier from all liability whatsoever may be allowed in England but struck down in the USA as contrary to public policy.[33] Such a clause, which attempts to contract out all liability whatsoever, may also be considered null and void under civil law as against the general assumption of good faith and fair dealing in contracts. Therefore, parties must be careful in which court they bring an action, and private international law plays a very important role in that respect.

Courts in England tend to construe restrictively statements or notations on the bills of lading stating that the cargo will be carried on deck, which are intended to produce the effect of excepting the carriage from the Rules. The rather high standards can be explained with the need of protection of shippers, consignees or third-party bills of lading holders. As already stated above, they all must be well informed about the risks involved in the shipment.[34] Thus, if an on-deck statement, which purports to exclude the carriage from the ambit of the Rules, is unclear or ambiguous, the Court will apply the *contra proferentem rule* and construe this statement or notation, as well as any ambiguity, against the party which drafted it, namely the carrier.[35] Moreover, it is the carrier who bears the burden of proof to establish, should there be any ambiguity, that the statement is indeed one that in fact states on-deck carriage.[36]

The standard for assessing the admissibility of a statement that cargo will be carried on deck varies from a case to case but, as an example, the following notation in

[31] The carriage of containerized cargo will be further discussed in more details in *Chapter V* on the carriage of containers.
[32] For an informative comparison of the deck cargo regimes in several European jurisdictions, see section 6.
[33] R. Glenn Bauer – *'Deck Cargo: Pitfalls to Avoid Under American Law in Clausing Your Bills of Lading'*, 22 J. Mar. L. & Com. 287 (April 1991), at p. 288-289.
[34] See: *Section 5* above.
[35] *Sideridraulic Systems SpA and Another v BBC Chartering & Logistic GmbH & Co KG (The "BBC Greenland")* – [2012] 1 Lloyd's Law Reports 230, at p. 235, para 21.
[36] *The "BBC Greenland"* – [2012] 1 Lloyd's Law Reports 230, at p. 235, para 21 (*ibid.*).

The "BBC Greenland"[37] was accepted by the court as a valid notation, which excluded the goods from the Hague-Visby Rules for being "deck cargo":

> *MASTER'S REMARKS*
>
> *— ALL CARGO LOADED FROM OPEN STORAGE AREA*
>
> *ALL CARGO CARRIED ON DECK AT SHIPPER' S / CHARTERER'S / RECEIVER'S RISK AS TO PERILS INHERENT IN SUCH CARRIAGE, ANY WARRANTY OF SEAWORTHINESS OF THE VESSEL ESPRESSLY WAIVED BY THE SHIPPER / CHARTERER / RECEIVER.*
>
> *AND IN ALL OTHER RESPECTS SUBJECT TO THE PROVISIONS OF THE UNITED STATES CARRIAGE OF GOODS BY SEA ACT 1936. […]*

The carriage was a second shipment of sand filter tanks for a water treatment plant from Italy to Alabama between the same parties under a fixture recap, which stated *"shipment under/on deck in owners' option, deck cargo at merchant risk and b/l to be marked accordingly"*.[38] The first shipment of 13 tanks, most of which carried on deck, was completed without incidents. The current case concerned the second shipment of 10 filter tanks, which were carried on the deck of *BBC Greenland* under a bill of lading with the above notation on its face. On the reverse of the bill, there were terms which provided for the application of the Hague Rules as enacted in the country of shipment (which was Italy, where the Hague-Visby Rules were enacted), and for London arbitration and the application of English law.

During the journey, one tank was lost and another was damaged. One of the main questions was whether this provision on the bill of lading was to be interpreted as a statement which sufficiently specifies that the tanks were indeed carried on deck, or whether it was a mere warning of the perils inherent in such carriage. The Court held that the tanks were "deck cargo" within the meaning of the Hague/Hague-Visby Rules. What the Court took into consideration was, first, the master's remark on the face of the bill of lading, which was construed as a statement of fact regarding the mode of carriage, and which was not considered ambiguous; secondly, the previous business conducted between the parties where the same remark could only be understood as an on-deck statement; thirdly, that a reasonable third-party transferee of the bill of lading would be able to ascertain from the terms on the bill whether the cargo was in fact carried on deck or under deck.[39]

As a result, the Hague-Visby Rules did not apply to the carriage because the parties did not extend their application to cover deck cargo as well, which they could have done. The Court, however, underlined *obiter* that if the cargo had been carried below deck, then the Hague-Visby Rules would have applied with the force of law. Yet, under the circumstances in the present case, the "deck cargo" notation excluded the Rules, whereas US COGSA 1936 applied because the bill of lading expressly provided so. US COGSA 1936, on which the parties expressly agreed on the face of the bill, was considered by the Court as a different and inconsistent regime to the Hague/Hague-

[37] *The "BBC Greenland"* – [2012] 1 Lloyd's Law Reports 230.
[38] A fixture recap is a document transmitted when a fixture has been agreed between a shipowner and a charterer, setting forth all of the negotiated terms and details. The fixture recap is the operative document until the charter party is drawn up.
[39] *The "BBC Greenland"* – [2012] 1 Lloyd's Law Reports 230 at p. 234-236, para 18-25.

Visby Rules.[40] Consequently, the carrier could pursue liability exemption under the exemption clause contained in the on-deck statement on the face of the bill of lading, or pursue limitation of liability under the US COGSA 1936, which is generally more favourable to carriers compared to the limitation of liability provision set forth in the Hague-Visby Rules. Also, the contractual provision that the parties may commence suit in a US court of proper jurisdiction if US COGSA 1936 is applicable to the contract, was also upheld. Again, the English court pointed out that the parties contractually bestowed exclusive jurisdiction upon American courts only in the event that the US COGSA 1936 would apply to the carriage; therefore, should the Hague-Visby Rules were applicable (*i.e.* should cargo been not considered "deck cargo"), then American courts would not have had jurisdiction.[41]

This case is a good example of how dramatic the changes may be for the parties involved, from a legal perspective, if a statement or a notation on the face of the bill of lading is regarded by the Court as a statement for "deck cargo" within the meaning of Article I(c) of the Hague/Hague-Visby Rules.

However, whether cargo carried on deck is considered "deck cargo" for the purpose of the Hague-Visby Rules is not always subject to the same determinants. Although there is an apparently uniform distinction between authorized and unauthorized deck carriage, it is not all black and white when courts have to consider whether certain carriage on deck is legal or not. One has to put this distinction between legal and illegal deck carriage into the particular context in order to reach an objective assessment of the legality of the deck cargo.

Most importantly, courts will assess three major factors when drawing the line between legal and illegal deck cargo. Firstly, it must be established how objectionable the increase of the risk is when cargo is carried on deck. This comes down to the question whether the cargo is suitable for being loaded and carried on deck. As stated elsewhere, the risk varies as it could be significantly minimized in certain trades, but it could also well be significant, for example, for sensitive goods that are not suited for transportation on the weather deck. Similarly, the type and design of the vessel has also bearing on the increase of the risk with regard to the carriage of cargo on deck. The second factor that is to be weighed is how objectionable the liability exemption clauses are. In particular, it must be established whether carriers – in their attempt to limit or exclude liability altogether – have impaired the balance of interests of the carrier and of the cargo owners.[42] Thirdly, due regard must be given to the issue of how clearly all those risks and exemptions pertaining to deck cargo have been communicated to the cargo interests. In other words, is the shipper aware of such carriage arrangements?

Perhaps what makes deck cargo so difficult from a legal point of view is that these different factors stated hereabove are weighed differently under different jurisdictions. Hence, there are different results in adjudicating.

[40] *The "BBC Greenland"* – [2012] 1 Lloyd's Law Reports 230 at p. 237, para. 30.
[41] *The "BBC Greenland"* – [2012] 1 Lloyd's Law Reports 230 at p. 237, para. 30 (*ibid.*).
[42] For the permissibility of the carrier's defences under English law, see section 5.4 *infra.*

4. Current law on deck cargo: how technology and modern practices remodeled the old doctrine

The previous section sought to establish that, under the traditional deck cargo doctrine reflected in the Hague-Visby Rules, there was a clear connection between a clean bill of lading and the obligation to stow the cargo below deck.

This, however, has changed throughout time, and the evolvement in the views on deck cargo happened gradually, fostered by the trade, technological and shipping developments. The major risk-determining factors related to deck cargo are the nature of the cargo and the nature of the carrying vessel, both of which have substantially evolved in the 20th century. The leading liability regime, on the other hand, has not changed since 1924 as the 1968 amendment did not introduce any revision of the Rules as far as deck carriage is concerned. However, courts interpreted the Rules differently throughout the years in accordance with the prevailing views on deck cargo at that time.[43] Especially with respect to containerized cargo, a different rule has evolved, which renders the old doctrine on deck cargo inapplicable in many jurisdictions.[44] English courts, in particular, have come a long way struggling to catch up with the developments in the shipping world and to close the gap between a legislation based on shipping realities that date back almost a century ago, on the one hand, and the modern-time business and trade practices, on the other.

Currently, there are three permissible ways to carry cargo on deck – by custom, by an agreement, or by a convention.[45] The following sub-sections will review each of these authorized ways of deck carriage, preceded by a factual analysis of the risks relating to deck cargo.

4.1 Factual study

4.1.1 Assessing the risk of carrying on deck

Merely 100 years ago, when the Hague Rules were drafted, and well before the advent of containerization, stowage of cargo on the weather deck substantially augmented the risk for the goods, which could be either washed away or damaged as a result of breaking-wave impact or of the intensified forces exerted on the deck cargo because of pitching, rolling, yawing. Furthermore, vessels were exposed to a greater degree to forces exerted by wind and waves as a result of the cargo towering from the weather deck upwards, which diminished the vessel's stability whereby listing and even capsizing was much more likely. Such augmented forces, acting on the vessel, could even result in losing her rudder and thus rendering her unseaworthy.

Given the design of the vessels at that time, which were mostly shaped to carry goods below deck, all those risks were inherent to the carriage on deck, and that is why the carrier was usually held liable for stowing goods on deck and, in some jurisdictions,

[43] For the evolving views on deck cargo under English law, see *section 5*.
[44] Croake, D. J. in *Encyclopedia Britannica v Steamship Hong Kong Producer* [1968] A.M.C. 169 at p. 170: *"The court recognizes that there has been an increase in the use of containers in the shipping industry. The United States Supreme Court in constituting the meaning of the term "clean" bill of lading had indicated that a general port custom permitting above deck stowage could modify the meaning of a "clean" bill."*
[45] *'Voyage charters'* (3rd edition), Informa London (2007), p.962, para 85.71.

it was not extraordinary to apply the deviation rule to a carriage on deck.[46] Accordingly, the views on deck cargo were quite negative and the doctrine in that time, as observed *supra*, was very restrictive. It is, thus, obvious that the doctrine on deck cargo is closely related to the risks, to which the goods carried on deck are subjected. Therefore, in order to assess the current law on deck cargo, a factual background will be carried out in order to see to what extent those past risks related to deck cargo have been mitigated nowadays, given the modern shipping practices and innovations.

Undoubtedly, containerization is a central issue when discussing the nowadays' risks posed by the carriage of goods on deck. The fact that there are bigger and bigger container vessels being built as the current capacity of the biggest container ships today reaches up to 20 000 containers, it is obvious that the problem of on-deck stowage of containers will be of even growing importance in the future. The types of goods that can be transported in a container are almost limitless and that is why containerization comprises the vast majority of the cargo transported by sea nowadays. Besides the changes that it brought to the shipping industry, the container significantly has reduced some of the risks inherent to the stowage on deck such as damage, loss or pilferage. The structure of the container affords extra protection in comparison to other packaging materials. What is more, the so called "reefer" containers, for example, provide constant refrigeration of the cargo packed inside, while being water and light resistant as well as fully operational at outside temperature of up to 50°C.[47] This allows perishable goods to last for much longer. Another example of the diminished risk provided by the containerized shipments is that today it is sufficiently safe to transport in containers, below or above deck, of relatively sensitive pieces of cargo such as family cars. Automobiles can be now shipped not only via a ro-ro vessel, but also on a container vessel, which is an evidence of the reduced risks and safety provided by the "box".

Statistical data reveals the quantitative aspects of the risks related to the carriage of cargo on deck and shows how much these risks have shrunk in the recent years due to the technological advancements, the innovative ship designs, and the ceaseless efforts of the shipping industry to improve safety.

Although comprehensive statistics about deck cargo that has been lost overboard does not exist, the World Shipping Council (WSC) carried out a survey among its members, which can be quite indicative considering the fact that the WSC's members represent approximately 90% of the global containership capacity.[48] The survey was conducted in 2011 and was later updated in 2014 as each survey comprised statistical data for a period of three consecutive years. The results from the first survey showed that for the period 2008-2010 there were approximately 350 containers lost per year on average, without counting the catastrophic losses.[49] The data for the period covering the

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[46] See *section 5.1.3* below.

[47] *'Guidelines for the Carriage of Refrigerated Containers on Board Ships'* (Edition 2003), Germanischer Lloyd Aktiengesellschaft, Hamburg, available at: http://www.gl-group.com/infoServices/rules/pdfs/gl_i-1-19_e.pdf, Section I, point A, item 3.

[48] See all the WSC member companies at http://www.worldshipping.org/about-the-council/member-corporations.

[49] When catastrophic losses are included, the figures rise up to 675 containers per year on average for the period 2008-2010, and to 2,683 containers per year on average for the period 2011-2013, respectively. However, catastrophic losses are the result of relatively rare events such as groundings, structural failure, or collisions, which expose both below-deck and deck cargo to more or less the same risks. Examples of such

years 2011-2013 revealed 733 containers lost at sea per year on average. Considering the total number of containers shipped annually at that time, which was about 100 million and 120 million containers, respectively, the lost containers represent only a negligible fragment of the total amount of containerized cargo shipped worldwide. To be precise, these amount to about 0.00035% of all containers worldwide during the first survey period, and about 0.00061% with regard to the second survey period. Although there seems to be a significant rise in the number of containers lost overboard, the loss of deck cargo in terms of percentage has actually negligibly changed when taking into account the increase in the total quantity of containers carried by sea worldwide from 100 to 120 million containers during the second survey period.

And to be even more accurate, it has to be reminded that the world's total container shipments, obviously, comprise both containers carried below deck and containers carried on deck. That is why, in order to more accurately measure the risk of carrying goods on deck, we have to give an account of the losses related only to the total amount of containers carried on deck, which can safely be assumed to be approximately half of the entire seagoing container trade.[50] In other words, to reflect the precise fraction of the lost containers carried on deck, we have to double those percentages that were stated above. But even in this case, or even if we triple them, the fraction of deck containers lost overboard is so minute that it better be measured not per cent but per mille (‰) or even in parts per million (ppm).

These encouraging results as regards containerized goods carried on deck are largely due to the advancement of the shipping industry nowadays and the practices and projects carried out towards enhancing cargo safety. In particular, the seafaring industry has been targeting the major reasons for loss of or damage to deck containers, namely improper packing, poor stowage, insufficient lashing as well as structural failure of the container.[51]

However, it must be admitted that the losses of or damage to containers stowed on deck still surpass the losses of or damage to containers stowed in the hold below deck. Besides the cargo-related damages or losses, incidents with containers may endanger the

disasters are the *M/V Rena* (2011), which ran aground and broke in two with the aft section sunk, and the *MOL Comfort* (2013), which broke in two and sank together with all containers on board. Accordingly, data from such catastrophic events could not highlight and express in numbers the additional risks to which deck cargo is exposed as opposed to cargo stowed below deck, and that is why it will be disregarded. The WSC safety survey can be found at: http://www.worldshipping.org/industry-issues/safety/Containers_Overboard__Final.pdf, and the updated results in 2014 of the containers lost at sea are accessible at http://www.worldshipping.org/industry-issues/safety/Containers_Lost_at_Sea_-_2014_Update_Final_for_Dist.pdf.

[50] Such assumption can be made on the basis of the ship design of nowadays container vessels. For example, the design of the Germanischer Lloyd and the Korean yard Hyundai Heavy Industries (HHI) for a 13,000+ TEU container vessel provides for 6,230 containers stowed below deck and 7,210 containers stowed on deck.

[51] Examples of efforts targeting flaws affecting deck carriage are: the 2006-2009 project Lashing@Sea promoted by the Maritime Research Institute of the Netherlands (MARIN) aimed towards preventing lashing failure and improving the lashing procedures and rules; the 2008 guide with best practices *Safe Transport of Containers by Sea* issued by the International Chamber of Shipping (ICS) and the World Shipping Council (WSC); the new Code of Practice for Packing of Cargo Transport Units (CTU Code) for the handling and packing of shipping containers, which is a joint product of the International Maritime Organization (IMO), International Labour Organization (ILO), and the United Nations Economic Commission for Europe (UNECE); a WSC project to amend the ISO standards of containers so that the latter are accordingly marked and easy to identify if they have reduced stacking capacity, thus preventing structural failure of the container.

safety of the vessel or of other vessels, especially smaller crafts and fishing boats.[52] Semi-submerged containers may become a threat to navigation and to the environment as well, especially if they are used for the shipment of hazardous cargo.

Therefore, the major causes for accidents with containerized vessels will be examined below because they are the gist of the risks associated with the carriage of cargo on deck. These reveal the qualitative aspects of the risks of carrying goods on deck and are mainly associated with stowage and securing of the cargo on deck.

With regard to securing, the vessel *M/V Santa Clara I*, which lost 21 containers off the cost of New Jersey, US in early 1992, is a prominent example. This was a major accident because four of the containers comprised hazardous cargo (arsenic trioxide). The subsequent thorough investigation conducted by the Coast Guard revealed that the reason for the misfortune was a failure in securing the cargo which was attributed to a human error coupled with bad weather.[53] In particular, the report revealed both mechanical and operational weaknesses. The former included: insufficient wire lashings; improper installations of those lashings; use of damaged lashing gear; improper stowage of 20-foot containers in a 40-foot cell, which left each container unsecured on one end; loose hatch covers (being the foundation of the on-deck tiers of containers), which allowed for lateral movements of the stow. The operational weaknesses consisted of: non-compliance with the recommended international standards on cargo securing – the IMO's Cargo Securing Manual; lashing of the deck cargo performed underway during heavy weather, meaning that the standard of care prescribed by Article III rule 2 of the Hague/Hague-Visby Rules was not met; failure to make an accurate assessment of the storm and the wind, and to take appropriate actions to avoid the deteriorating weather, meaning that the master has failed in navigating the ship.

As a result of that accident, it was recommended that the International Maritime Organization's (IMO) voluntary guidelines on cargo securing be adopted as mandatory regulations part of the International Convention for the Safety of Life at Sea (SOLAS).[54] This took place in the 1994 amendments to SOLAS.

As far as stowage is concerned, these operations are vital for the safety of the cargo and of the vessel herself. In practice, heavier containers must be stowed on the bottom, whereas the upper tiers must consist mainly of light containers. This on-deck stowage system minimizes the risk of collapsing of containers as a result of excessive loads on the lower tiers, and it also diminishes the forces and the acceleration acting on the gear securing the upper tiers of containers.[55] In this way, the vessel's stability is also optimized. Unfortunately, there are several drawbacks pertaining to these safety policies.

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[52] For example, the 500 containers lost from *Svendborg Maersk* in 2014 in the Bay of Biscay were considered a serious threat by the French maritime authorities, which required Maersk to conduct a search to locate and pull back the lost containers. Even containers on the sea bottom were seen as a danger for local fishermen, whereas empty containers were considered to be able to float on the surface for weeks.

[53] The *Santa Clara I* case study is accessible at: http://onlinepubs.trb.org/onlinepubs/hmcrp/hmcrp_w002CS.pdf.

[54] See SOLAS Chapter VI/5.6 on stowage and securing.

[55] *'On Deck Stowage of Containers'*, American Institute of Marine Underwriters (AIMU), Technical Services Committee, at p. 11; available at: https://www.aimu.org/aimupapers/OnDeck.pdf.

First, there is no internationally recognized standard to define a heavy or a light container, which does not help container operators to plan accordingly. The lack of international regulations to that regard also lead to undesirable discretion as to which container is considered heavy and which light.

Secondly, the stowage and securing plans aboard a container vessel assume, but cannot guarantee, that the cargo within the container is properly stowed and secured as the latter task is outside the carrier's obligations over the cargo. To that regard, heavy equipment that is not properly secured within a container may pose serious risks to the entire stow as it may break loose, pierce the container wall, and come outside damaging adjacent containers stowed on deck. Such incidents may often lead to a domino effect as well.[56] However, the drawback of the carrier not being familiar with the contents of the container and whether the goods inside have been properly secured and stowed, does not apply to the situation where it is the carrier who has supplied, stuffed, and loaded the container on deck. In this case, those specific risks described to deck carriage do not exist as the carrier will be fully familiar with the weight distribution and the securing specification of the containerized goods.

Thirdly, in practice carriers often continue accepting additional cargo when the vessel has berthed and the contracted cargo is already being loaded. This means that if heavy containers arrive late, they may well be placed on top of a tier, which undermines all the safety precautions of the stowing plans and makes them virtually obsolete.[57]

In the fourth place, a common problem to nowadays container shipping is the misdeclaration of the weight of a container. Often containers are overloaded, which creates the same risks as the ones outlined in the previous setback. A prominent example of the risks that accompany overloaded containers is the 2007 accident with *MSC Napoli* in the English Channel. An investigation conducted by the UK Maritime Accident Investigation Branch (MAIB) revealed that 137 out of the 660 containers stowed on deck were overloaded (*e.g.* heavier cargo was loaded than what was declared).[58] This means that about 20% of the deck cargo was in fact weighing more than what was recorded on the bill of lading and, accordingly, on the cargo manifest. The difference varied from 3 to 20 tonnes as the total surplus of weight was 312 tonnes. The result was that the container vessel sustained catastrophic structural damages, which led to an ingress of water into the ship through an opening in the starboard forward of the engine room, and eventually the crew was forced to abandon the vessel.

A similar accident occurred with the container ship *M/V Deneb*, which suffered in 2011 a critical stability accident at the Port of Algeciras, Spain. The vessel started listing to her starboard until the entire starboard and bow were submerged. It was later established that, out of the 163 containers on-board, there were 16 that had an actual weight that exceeded the declared weight, and they were stowed high above on deck. Thus about one-tenth of the containers were misdeclared and they were deck cargo. This

[56] *'On Deck Stowage of Containers'*, American Institute of Marine Underwriters (AIMU), Technical Services Committee, at p. 13; available at: https://www.aimu.org/aimupapers/OnDeck.pdf.
[57] *'On Deck Stowage of Containers'*, American Institute of Marine Underwriters (AIMU), Technical Services Committee, at p. 13; available at: https://www.aimu.org/aimupapers/OnDeck.pdf. (*ibid.*)
[58] The MAIB report on the Structural failure of container vessel MSC Napoli and subsequent beaching, accessible at: https://assets.digital.cabinet-office.gov.uk/media/547c703ced915d4c0d000087/NapoliReport.pdf, p. 29.

excess in weight ranged from 1.9 times to 6.7 times as the total surplus weight of the 16 misdeclared containers amounted to 278 tons instead of the declared 93 tons. Coupled with the fact that the overweight containers were stowed on deck, which additionally affected the stability of the vessel, the overall 4 times higher weight of the 16 misdeclared containers was considered the prime reason for the accident.[59]

To summarize, the statistical data adduced to measure the risks of deck carriage points to the conclusion that deck cargo in the beginning of the 21st century enjoys considerably higher protection than before, which is a result of the developments in the industry as well as of the purposeful efforts of international bodies towards improvement of stowage, securing, and lashing. Furthermore, the analysis of shipping losses evidences that among the main reasons there are insufficient knowledge, inadequate skills, human errors as well as failure to understand or apply stowage and securing regulations. None of these, however, is inherent to deck carriage. On the contrary, the following sub-section will evidence that some ship designs may even reduce the human factor when it comes to securing the cargo on deck.

4.1.2 Ship design

As implied *supra*, the risks related to deck carriage are greater in older vessels. At the beginning of the container transport, containers were shipped mostly on general cargo vessels, which posed considerable risks. What is more, this was equally true for containers stowed under deck as well because the cargo holds of those ships were not designed for the carriage of such huge units such as the TEUs or FEUs, which caused all kinds of stowage problems, especially when containers of different sizes were loaded next to or on top of each other.[60] However, nowadays there are many types of cargo vessels designed to carry containers: multipurpose container vessels, semi-container vessels, all-container vessels, feeder vessels, open-hatch container vessels, *etc.* Regardless of the type, modern container vessels are broader amidships and, thus, they can counter stability issues that arise from the heavy and tall loads on deck.

Today's container vessels are specially built to carry containers on board. Their hull is designed to have numerous cells within a hold as well as specially-created vertical slots where containers are stowed. There is no separation between the holds in such a vessel, instead every hold has cell guides which are, in essence, vertical rails that allow the containers to be stacked vertically one on top of the other. Where the below-deck containers are fixed by means of these rails, above-deck containers may be secured either with manually-applied lashings or tension rods, or with the same cell guide structure that is applied below deck. Such ships are referred to as "fully cellular" or "purpose-built", and their design provides to stow more than half of the containers on deck, while for the smaller vessels the figure can even go up to three-quarters of the containerized cargo.[61]

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[59] The technical report and the investigation of the capsizing of *M/V Deneb* are available at: http://www.fomento.gob.es/NR/rdonlyres/7501ACC9-94FA-44B7-B543-B66873C31A16/114289/ITA202012DenebINGOPTIMIZADOWEB.pdf

[60] W. David Angus – *'Legal Implications of "The Container Revolution" in International Carriage of Goods'*, McGill Law Journal (1968), Vol. 14, No.3, pp. 395-429, at p. 405.

[61] *'On Deck Stowage of Containers'*, American Institute of Marine Underwriters (AIMU), Technical Services Committee, at p. 18; available at: https://www.aimu.org/aimupapers/OnDeck.pdf.

Two major points can be inferred from this factual information. First, since a considerable part of the cargo shipped on a modern container vessel is carried on deck, there is nowadays little significance in the distinction between carriage on deck and below deck. Secondly, while it must be admitted that deck cargo-related accidents still occur (but so does accidents with below-deck cargo), the ever growing number of containers transported over sea, of which a huge percentage on deck, is a clear indication that the risks taken in such a carriage are not unreasonable.

Furthermore, some of nowadays' container vessels are even missing hatch covers and are, therefore, open-hatch container ships.[62] So, in a sense, such vessels cannot be said to transport cargo on deck since the latter is in fact missing. However, provided that such a shipment exposes the cargo to the same risks as the carriage of goods on the weather deck, it is considered deck carriage as well regardless that the containers are actually loaded on the tanktop and stowed in tiers upwards up to several levels above "the deck" as the cell guides extend to the full technically-permissible height of the deck cargo to reach even the uppermost part of a container tier (a vertical stack).[63] This increases the safety of the containers stowed "above deck" as those containers, stowed in the higher part of a tier, are well secured to the fixed cell guides and no manual lashing with cables or rods is needed, which would be the case, for example, with on-deck containers stowed on the hatch cover of a conventional container vessel. Besides minimizing the risk of containers shifting, collapsing, or being washed overboard, a hatchless design provides several other important advantages: firstly, by eliminating the hatches, the deadweight tonnage[64] of the vessel is increased, meaning that she can carry more cargo, while in the same time the vessel's stability is improved as significant weight is removed from the upper part of the hull; secondly, without having the need to open or close hatches, loading and discharge operations are performed much faster which diminishes costs; thirdly, an entire tier of containers is at any time accessible, whereas on conventional container vessels with hatch covers it is required to first unload the on-deck containers and open the hatches before having access to the containers stowed below deck.[65] With regard to the vessel's protection from rainwater or seawater getting into the hold, open-top container ships are either equipped with rain-protection roof made of lightweight steel or with bilge pumps that are taking the water out of the hold and thus preserving ship's stability and protecting the stowed containers.

Smaller container vessels, designed to carry between 100 and 800 containers, generally referred to as feeder vessels, pose additional risks to the cargo stowed on deck as their freeboard is significantly lower as compared to bigger container vessels. This means that the cargo stowed on the deck of such vessel is exposed to a bigger extent to

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[62] These are also known as open top or hatchless container ships. Although there is a vast variety of vessels designed to transport containers, most open-hatch containerships still have two forward holds covered with hatches, which are intended for the carriage of special, non-containerized, or hazardous cargo.

[63] *'On Deck Stowage of Containers'*, American Institute of Marine Underwriters (AIMU), Technical Services Committee, at p. 7; available at: https://www.aimu.org/aimupapers/OnDeck.pdf.

[64] Deadweight tonnage (DWT) is a measurement of weight that describes the carrying capacity of a vessel figured by metric tons. It equals the displacement "loaded" minus the displacement "light", where the former is the actual weight, which is displaced by a loaded vessel when floating, and the latter represents the weight displaced by a floating vessel (including fuel and supplies) when there is no cargo on board.

[65] *'Open-Top Container Ships'*, American Institute of Marine Underwriters (AIMU), Technical Services Committee, at p. 1-2; available at: http://www.aimu.org/aimupapers/OPEN.pdf.

sea water and to damage of breaking waves as well as wetting. A concession must be made that feeder ships, like all coasters,[66] usually call at smaller ports and their service is involved in regional or coastal trade, meaning that they are less likely to encounter adverse weather conditions to the same extent as, for example, a trans-oceanic container vessel crossing the North Atlantic. Nevertheless, it can be generally assumed that smaller container vessels, with their low freeboard, afford less protection to deck cargo from wetting damage or breaking waves.

Besides container ships, there are nowadays a myriad of other vessels that are designed to carry goods on deck. These are, for example, general cargo vessels, cellular vessels, supply vessels, bulk vessels capable of carrying non-bulk cargo, heavy-lift ships, semi-submersible ships, freight ships carrying packaged or break bulk cargoes, *etc.*

Furthermore, there are other trades where combined transport units, apart from containers, are carried both below and on deck. Depending on the method in which the cargo is handled in the particular trade, the carrying vessels have acquired the respective name. Examples of such vessels are the ro/ro (roll-on/roll-off)[67], the lo/lo (lift-on/lift-off)[68], sto-ro (stow and roll)[69], flo/flo (float-on/float-off)[70], wo/wo (walk-on/walk-off).[71]

4.1.3 Conclusion

To sum up, this reality check shows that the risks posed to deck cargo differ significantly nowadays as compared to the beginning of the 20th century, when the Hague Rules were drafted. Back in those times, deck cargo was viewed as an inherently risky shipping arrangement and that is why it was vital that the shipper had expressly consented to assuming all the risks pertaining to deck carriage by means of an express agreement stated on the face of the bills of lading.[72] However, while a century ago all risks were inherent to the carriage on deck, nowadays the risks consist of operational risks, which can be more easily described as operational and mechanical weaknesses; meaning that these risks do not originate from deck carriage *per se*. Therefore, deck carriage as such is no longer so risky as to restrict it altogether. What is more, the numbers of lost deck containers suggest that the loss of deck cargo is ever less likely, and the risks related to the carriage on deck have nowadays diminished to such an extent as to justify such practice.

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[66] The term "coasters" refers to smaller ships, regardless of the category of cargo they carry, which usually do not go on ocean-crossing routes as their service is restricted to coastal trades. Such vessels have significantly shallow hulls, which allows them to pass through reefs or underwater rocks, which are unapproachable for ocean-crossing vessels.

[67] On a ro-ro vessel, cargo is loaded or discharged on wheels. This method of cargo handling is most often employed in the ferry traffic.

[68] The cargo is loaded or discharged by means of the vessel's on-board loading gear, which lifts the cargo on and off. Such on-board gear may comprise derricks, cranes, or gantries.

[69] The cargo is either 'rolled on' or 'lifted on' but then it is stowed on board the vessel in a conventional manner, using forklift trucks.

[70] Cargo is loaded either by means of a floating dock-like holds, or via the vessels (a semi-submersible ship) semi-submerging under the cargo and then refloating and lifting it onto the predetermined on-deck space. Discharging takes place following the same method but in the reverse.

[71] This method of cargo handling allows live cargo to walk on and off the vessel. It refers to the carriage of live animals but the term is employed also to passenger vessels.

[72] See *section 5.1* on the traditional doctrine on deck carriage.

Furthermore, the examples of ship designs that were provided demonstrate how a modern design can not only enhance the versatility of the vessel but it can also ensure additional safeguards to cargo carried on the deck of modern vessels. In particular, current container vessels are technologically advanced, and their hull design reduces the risk of listing and capsizing. Also, as far as ocean-going container vessels are concerned, the risks are considerably minimized with regard to loss of or damage to the cargo as a result of a breaking wave or of the rolling, pitching, or yawing motion of the vessel during a storm.

Thus, the results of this factual study (*i.e.* that risks related to deck cargo have significantly diminished) allude to the presumption that the interpretation of the contract of carriage by the courts should not be so restrictive anymore. With regard to English law, this development towards a less restrictive regime will be observed in *section 5*, whereas *section 6* will summarize to what extent the traditional doctrine on deck cargo is still applicable in various other jurisdictions.

4.2 Deck cargo as a custom in the trade

4.2.1 Containerization

The invention of the container, also called the box, revolutionized the shipping world and global trade.[73] It introduced dramatic changes in both the supply chains and the way of transporting vast quantities of goods over sea. With regard to the subject matter of the current chapter, it is sufficient to note that containers and containerization has turned the carriage of goods on deck much into a norm rather than an exception and courts have begun to recognize that position.

Throughout the years there has been a debate whether the carriage of containers on deck has turned into a customary practice. As early as in the 1960s, there were proponents of the argument that carriers had the general liberty to stow containers on deck based on a well-established custom and usage concerning containerized cargo, which was considered tantamount to an implied claused in the contract of carriage, with which shippers were deemed to have agreed.[74] Similarly, today's authors are of the opinion that shipping containers on the deck of a vessel that is specially designed to carry containers has nowadays turned into a recognized custom in the container trade.[75] Such carriage can be exercised under a general liberty clause, meaning that no express statement or notice is needed on the face of the bill of lading, making deck carriage of containers not an exception but an alteration of the Hague/Hague-Visby Rules. This alteration of the Rules is overall considered permissible but uniformity in that respect is not present.

The lack of uniformity is largely due to the fact that the concept of authorized (legal) deck cargo, as derived from the Hague-Visby Rules, is not equally perceived and

[73] The carriage of containerized cargo will be further discussed in more details in *Chapter V* on the carriage of containers.

[74] W. David Angus – *'Legal Implications of "The Container Revolution" in International Carriage of Goods'*, McGill Law Journal (1968), Vol. 14, No.3, pp. 395-429, at p. 403. Note, however, the decision of Charles Brieant, Jr., D.J. in *The "Mormacvega"*, [1973] 1 Lloyd's Reports 267: *"the practice [of carrying containers on deck], however, was not sufficiently ancient to make it a trade custom"*.

[75] A.T.M. Nesarul Hoque – *'Container on deck: an international standard banking practice?'*, DCInsight, Vol. 19, No. 4, October-December 2013.

applied in the various jurisdictions and also in the various situations of deck carriage. With regard to the various circumstances of carriage on deck, open-hatch (hatchless) containership, for example, cannot be deemed to be capable of transporting cargo on deck illegally. That is to say, in such cases, the literal interpretation of Article I(c) of the Rules becomes obsolete and unnecessary. As far as the differing views of various jurisdictions are concerned, the notion of authorized and unauthorized deck carriage may vary depending on the courts' interpretation of how clearly the intended deck carriage has been communicated from the carrier to the shipper (*i.e.* the presence of an informed agreement).

In Belgium, for instance, there is a strict adherence to the traditional doctrine on deck cargo even with regard to container vessels. Belgian courts are very harsh towards carriers when loss or damage is caused as a result of undeclared deck cargo even if it has been stowed in containers on the deck of a specially-built container vessel unless this vessel is of the type of an open-top (hatchless) container vessel – only in that latter case, an exception will be made from the judicial practice on deck cargo.[76] Thus, under Belgian jurisprudence, a clean bill of lading will almost always signify that the cargo is stowed below the deck, and should cargo is carried on deck, a third party holder does not have to prove negligence on behalf of the carrier to hold him liable. The very act of stowing on deck under a clean bill of lading represents an act of negligence under Belgian law and the carrier cannot rely neither on the liability limitation and exceptions in the Hague-Visby Rules, nor or on any liability-exemption clauses in the bill of lading.[77] This is an example of how the changed standard in defining the difference between authorized (legal) and unauthorized (illegal) deck carriage has an impact upon the acceptability of any attempted exemption clauses. *Sections 5 and 6* below reveal further the non-uniform approach towards what constitutes authorized deck cargo within the meaning of the Hague-Visby Rules, which in the end creates different rules on national level, which in some instances may overprotect deck cargo interests but in others may provide them with insufficient protection.

Regardless of the lack of uniformity in the treatment, the carriage of containers on deck is nowadays largely accepted as an inherent characteristic of the container trade, and that is why it is considered as authorized deck carriage regulated by the Hague/Hague-Visby Rules notwithstanding that there will be normally no statements or notations on the bill of lading as to the precise location of the container.[78] An exception to that general rule can be made only for goods that require under-deck stowage. Moreover, the impressive share of containerized shipments nowadays (more than 85% of the total cargo), and the fact that in container arrangements there inevitably are containers stowed on deck, also suggest a well-established custom of deck carriage within that trade.[79]

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[76] Clive Van Aerde – *'The Belgian Courts hold Carriers fully liable'*, The Swedish Club Letter, No. I – 2003, p. 14.
[77] Clive Van Aerde – *'The Belgian Courts hold Carriers fully liable'*, The Swedish Club Letter, No. I – 2003, p. 14.
[78] *'Voyage charters'* (4th edition), Informa London (2014), p. 1018, para 85.74.
[79] A.T.M. Nesarul Hoque – *'Container on deck: an international standard banking practice?'*, DCInsight, Vol. 19, No. 4, October-December 2013.

For the current chapter, it is of material importance to underline that while the industry practice is to include in the contract of carriage a statement "carried on deck", which represents the express agreement between the parties and excludes the application of the Rules, this practice is not exercised when containerized cargo is carried on deck.[80] On the contrary, depending on the trade, contracts of carriage related to containers carried on deck very often provide for the application of the Hague/Hague-Visby Rules.[81] The rationale behind the absence of a deck statement or notation is that in the containerized trade it is sometimes not known, by the time the B/L is issued, where exactly the container will be placed – on deck or below deck. That is to say, there are some specific organizational and operational difficulties – such as the weight of the container and its destination – that prevent it to be ascertained in advance whether a container will be stowed on deck or in the hold. Instead, this usually becomes clear as late as in the moment of loading, which makes it impossible for a carrier to comply with the formalities required by Article I(c) of the Hague-Visby Rules in order deck cargo to be considered legally carried.[82]

Moreover, issuing on-deck B/L in advance is not wise because it will render the cargo not a subject to the Hague-Visby Rules and thus such a bill may not be accepted by banks, which may impair credit payment arrangements such as a letter of credit.

That is why nowadays container liner carriers issue bills of lading without an "on deck" notation but only relying on a liberty clause to stow on deck. Below is an example from the Maersk terms and conditions relating to deck stowage:

> ***18. Optional Stowage, Deck Cargo and Livestock***
>
> *18.1 The Goods may be packed by the Carrier in Containers and consolidated with other goods in Containers.*
>
> *18.2 Goods whether packed in Containers or not, may be carried on deck or under deck without notice to the Merchant. The Carrier shall not be required to note, mark or stamp on the bill of lading any statement of such on deck carriage. Save as provided in clause 18.3, such Goods (except livestock) carried on or under deck and whether or not stated to be carried on deck shall participate in general average and shall be deemed to be within the definition of goods for the purpose of the Hague Rules or US COGSA and shall be carried subject to such Rules or Act, whichever is applicable.*
>
> *18.3 Goods (not being Goods stowed in Containers other than flats or pallets) which are stated herein to be carried on deck and livestock, whether or not carried on deck, are carried without responsibility on the part of the Carrier for loss or damage of whatsoever nature or delay arising during the Carriage whether caused by unseaworthiness*

[80] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), Chapter V, p. 125, para 5.125.

[81] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), Chapter V, p. 125, para 5.125 (*ibid.*).

[82] Божидар Христов – *„Отговорност на морския превозвач при контейнерните превози"*, Библиотека „Българска търговско-промишлена палата" (БТТП), София (1977), сигнатура №105, стр. 22. [Bozhidar Hristov – *'The Responsibility of the Sea Carrier in Containerized Shipments'*, issued by the Library to the Bulgarian Chamber of Commerce and Industry (BCCI), Sofia (1977), signature №105, p.22.]

> *or negligence or any other cause whatsoever and neither the Hague Rules nor US COGSA shall apply.*[83]

The shipper's consent for deck stowage is deemed to be given upon acceptance of the carrier's tariff rates. The rationale is that the freight for shipping on deck and the freight for shipping below deck differ and the rate for deck carriage is usually lower. Needless to elaborate much, the freight rate for cargo stowed below deck is higher than for cargo stowed above deck because, although the risks for deck cargo has significantly diminished as illustrated in *section 4.1*, the losses of containers shipped on deck still prevail over those of containers carried in the hold. This means that both deck cargo and goods stowed in the holds are subject to the same regime despite the differing risks. Consequently, when it comes to the protection afforded by the Rules to the cargo interests, the owners of deck cargo may be worse off as opposed to the owners of cargo stowed in the holds of the vessel.[84]

The logical question that arises then is whether a shipper can insist on under-deck carriage. In other words, to what extent is a shipper able to regulate this part of the contract of carriage with a container liner operator and stipulate that his containers must be stowed below deck? In practice, shippers can have specific stowage requirements and arrangements, and demanding below-deck stowage is not only possible but also necessary, especially when the shipment consists of goods that are not suitable for deck carriage. An example of such cargo is sensitive electronic equipment or foodstuffs that may have to be carried in refrigerated or ventilated containers below deck in order to prevent damage from solar radiation, sea or rainwater, or excessive temperature variations. To request such a stowage arrangement, shippers must indicate their preference in the Export Cargo Shipping Instructions form that is provided by the carrier or the freight forwarder. It is important to note that, in practice, such shipping instructions are taken into consideration by the carrier if they are justified in the sense that the nature and properties of the goods stowed in the container indeed require below-deck stowage.[85] In other instances, carriers may ignore a shipper's request to stow a container below deck when the carriage takes place on a regular container vessel. This was also noted by the US District Court (Southern District of New York) in the case *The "Red Jacket"*:

> *Since this was a container ship, it was equipped to carry containers on the weather deck as well as in the hatches. Consequently, a request for below deck stowage, unless the cargo was marked dangerous, would be ignored. The Court finds that [the carrier] AEL was not negligent in stowing the ingots on deck.*[86]

4.2.2 Other trades

There are other trades besides the container trade, where the carriage on deck has become a custom. The carriage of heavy logs on deck, for example, has been for a

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[83] Available at: http://terms.maerskline.com/carriage.

[84] It must be conceded, however, that the Rules require the carrier to exercise a different standard of care, in accordance with Article III rule 2, when deck cargo is concerned. See *section 5.3*.

[85] Vlad Cioarec – *'Containers as Deck Cargo'* (August 2005), available at: http://www.forwarderlaw.com/library/view.php?article_id=337.

[86] *Houlden & Co, Ltd v SS Red Jacket (The "Red Jacket")*, 582 F.2d 1271 (2d Cir, 1978), [1978] 1 Lloyd's Law Reports 300.

long time recognized as a custom in the trade.[87] In general, trades where such customs have been established comprise the transportation of all kinds of out-of-gauge cargo and certain kinds of bulky cargo which cannot be stowed in the hold because they would not even physically fit inside such as roundwood logs (timber), railway engines, cranes, wind turbine generators as well as oil platforms, drilling rigs, and even other sea-going vessels. In those instances, the carrying ship is specially designed for carriage on deck such as purpose-build log-carrying vessels, heavy-lift vessels, or semi-submersible vessels (flo/flo). Such vessels have much greater lifting capacity than conventional ships and their deck area is far more spacious in order to accommodate bigger and heavier cargoes.

A custom should be distinguished from a practice. To be recognized as a custom, a practice must be not only common or usual but it must also conform to the certain requirements. In *"Sormovskiy 3068"*, it was established that a custom must be reasonable, certain, consistent with the contract, universally acquiesced, and it must not be contrary to law.[88] What is more, a custom does not have to be applicable to all ships or trades but just to the particular vessel that is engaged in the particular trade.[89] A carrier, however, cannot rely on an established custom within a particular trade in order to exculpate himself for the carriage on deck if this is done in breach of an express agreement to carry below deck. The latter represents a breach of a condition and is, thus, a contract deviation that cannot be justified with an established custom within the trade.

4.3 An express agreement between the parties to carry the goods on deck

As pointed out in *section 3*, deck carriage is excepted from the Hague and Hague-Visby Rules only when there is an express statement or notation on the face of the bill of lading that the cargo will be carried on deck, and when it is in fact carried on deck. An important remark is that a sufficiently clear statement is not needed in the occasion when the goods are subject to provisions which require the stowage on deck. This is because deck cargo is permissible also when it is required by a convention or arises out of statutory obligations for the carrier. In this case, the agreement between the parties to carry on deck is implied. This could be best illustrated by the carriage of dangerous goods and of solid bulk cargoes, which are regulated by the IMDG Code[90] and the IMSBC Code[91], respectively.

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[87] Richard Williams – *'The developing law relating to deck cargo'*, (2005) 11 JIML, p 100 at p. 107.
[88] *The Sormovsky 3068* [1994] 2 Lloyd's Rep 266, p. 275.
[89] Richard Williams – *'The developing law relating to deck cargo'*, (2005) 11 JIML, p 100 at p. 107.
[90] The International Maritime Dangerous Goods (IMDG) Code, issued by the International Maritime Organization (IMO), is a uniform international set of regulations for the safe carriage of hazardous cargo and marine pollutants. The Code aims at enhancing *"the safe carriage of dangerous goods while facilitating the free unrestricted movement of such goods and preventing pollution to the environment"* (The IMDG Code 2012, Preamble, para 1.). It contains mandatory instructions on terminology, packaging, labelling, stowage, segregation, ventilation, and handling of cargo that is considered dangerous because of its flammable, corrosive, toxic or other hazardous nature. The Code classifies dangerous goods into 9 classes such as explosives (Class 1), gases (Class 2), flammable liquids (Class 3), flammable solids (Class 4), etc. Since dangerous cargo presents risks in maritime transport that emanate mostly from packaging, stowage, segregation, and separation, the Code specifies that such cargo must be stowed and segregated according to the cargo's hazard, class, and compatibility.
[91] The IMDG Code is supported by a variety of international conventions, codes and recommendations, one of which is the International Maritime Solid Bulk Cargoes (IMSBC) Code, which is also mandatory. The Code

The IMDG Code distinguishes between 5 stowage categories: Category A, B, and E allow the carrier to stow the cargo both on deck and below deck, while Category C and D require that only on-deck stowage and carriage is performed.[92] Thus, for example, methyl iodide[93] (Category C) and methyl bromoacetate[94] (Category D) must be stowed always on deck. The IMSBC Code, on the other hand, also have provisions on stowage and securing. Regulation 7 of the Code admits that solid bulk cargoes may be carried on deck as well: *"Cargo, cargo units and cargo transport units carried on or under deck shall be so loaded, stowed and secured as to prevent as far as is practicable, throughout the voyage, damage or hazard to the ship and the persons on board, and loss of cargo overboard."* In particular, the Code provides 4 segregation terms for materials possessing chemical hazards: "away from", "separated from", "separated by a complete compartment or hold from", and "separated longitudinally by an intervening complete compartment or hold from". With regard to the first two terms, solid bulk cargoes may be stowed on deck as well provided that the safety precautions are fulfilled.[95]

In other instances, however, the agreement between the parties must be evidenced by a statement in the bill of lading. The question which naturally follows is whether a clause inserted in the bill of lading, which allows the carrier to stow on deck, can qualify for such a statement or notation that proves the express agreement between the carrier and cargo interests.

Both English case law and legal literature are unanimous on that matter. A "Liberty to Stow on Deck" clause is deemed to merely clarify where the goods may be stowed but it is not tantamount to a licence or permission to stow the goods on deck.[96] In *Svenska Traktor v Maritime Agencies (Southampton)*, Lord Pilcher J held that a general liberty clause cannot qualify for a statement in the contract of carriage, within the meaning of Article I(c) of the Rules, that the goods are indeed carried on deck. He described such a statement, as opposed to a liberty clause, *"as a notification and a warning to consignees and indorsees of the bill of lading to whom the property of the goods passed […] that the goods which they were to take were being shipped as deck cargo".*[97] In the presence of such a statement indicating on-deck carriage, the cargo interests will be fully knowledgeable on the terms of the contract, whereas the insertion of a general liberty clause does not provide the same certainty as to where the cargo will actually be stowed and carried.

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lays down both general and specific requirements for carrying solid bulk cargoes, and, if the substances are also considered dangerous goods, they are further regulated by the IMDG Code.

[92] These stowage categories are applicable for all classes of substances but for explosives, whereas for *Class 1* substances there are separate stowage categories: 01, 02, 03 (*on deck in closed cargo transport unit, or below deck*), 04 (*on deck/below deck in closed cargo transport unit*), and 05 (*on deck only in closed cargo transport unit*).

[93] The IMDG Code 2012, Chapter 3.2 – Dangerous Goods List, UN number 2644.

[94] The IMDG Code 2012, Chapter 3.2 – Dangerous Goods List, UN number 2643.

[95] See the IMSBC Code, Regulation 9.3.3: 1) *"Away from"*: Effectively segregated so that incompatible materials cannot interact dangerously in the event of an accident but may be carried in the same hold or compartment or on deck provided a minimum horizontal separation of 3 metres, projected vertically, is provided. 2) *"Separated from"*: In different holds when stowed under deck. Provided an intervening deck is resistant to fire and liquid, a vertical separation, i.e., in different compartments, may be accepted as equivalent to this segregation.

[96] Charles Debattista – *'The Sale of Goods by Sea'*, Second Edition (1998), ISBN: 0-406-02091-4, p. 148, fn. 17.

[97] *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton), Ltd.* [1953] 2 QB 124, at p. 130.

In *Svenska Traktor v Maritime Agencies*, the liberty clause at line 76 of the bill of lading read:

> *Steamer has liberty to carry goods on deck and shipowners will not be responsible for any loss, damage, or claim arising therefrom.*

Interestingly, the clause was considered by the judge as one containing two parts, and it was the second part, the one relieving the shipowners from liability, which ran against the Rules and was, therefore, held null and void under Article III rule 8. The first part of the clause, the one preceding the conjunction "and", was held to be valid subject to the carrier's obligations under Article III rule 2.[98] The conclusion is that a "Liberty to Stow on Deck" clause is not equivalent to a statement within the meaning of Article I(c), and therefore it does not make deck cargo falling outside the definition of "goods" and, accordingly, outside the scope of the Hague and the Hague-Visby Rules. Nevertheless, a liberty clause, while not excluding the application of the Rules, allows the shipowners to stow the cargo on deck as long as they properly and carefully load, handle, stow, carry, keep and care for the goods concerned.

The decision in *Svenska Traktor v Maritime Agencies*, however, is strongly criticized by the learned Professor W. Tetley.[99] He argues that the on-deck shipment in that case was a fundamental breach of the contract, because the liberty clause would be valid only if it was accompanied by a statement on the face of the bill of lading that the goods are carried on deck. He considers a general liberty clause merely as an option which can be exercised by the carrier only when there is a statement of deck carriage in the bill of lading.[100] Another reason, pointed out by W. Tetley as an irrefutable argument, for disagreeing with the *Svenska Traktor v Maritime Agencies* decision is that it ran against the principle that the typewritten wording on the face of the bill of lading (in this case, the absence of a statement) has precedence over the printed clauses (in this case, the general liberty clause at line 76).[101] While the first argument is logic and difficult to disagree with, had it not been for the recent developments on fundamental breach,[102] Tetley's second argument seems to be not that plausible and based on a weak foundation. In the opinion of the author of the current thesis, it is inaccurate to assume that the absence of a specific typewritten wording (*i.e.* a lack of a statement to carry goods on deck) can be used to demonstrate that there is actually a typewritten wording (equivalent to a statement to carry goods below deck) that goes contrary to the printed clauses in the bill of lading. In other words, Tetley's argument that a clean bill of lading qualifies as a statement that the goods will be carried below deck can be challenged on the basis that a clean bill of lading evidences no more than the implied duty of the carrier to stow below deck. Certainly, a clean bill of lading requires the carrier, in the absence of other contractual provisions, to stow below deck, but it will be dubious to

[98] *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton), Ltd.* [1953] 2 QB 124, at p. 130-131.
[99] William Tetley – *'Selected Problems of Maritime Law under the Hague Rules'*, McGill Law Journal, April 1963, p. 53.
[100] William Tetley – *'Selected Problems of Maritime Law under the Hague Rules'*, McGill Law Journal, April 1963, p. 53 at p. 64.
[101] William Tetley – *'Selected Problems of Maritime Law under the Hague Rules'*, McGill Law Journal, April 1963, p. 53 at p. 64.
[102] See: *section 5.1.3* on fundamental breach *infra*.

consider it a statement that could contradict and supersede the printed clauses in the bill of lading.

Furthermore, invalidating the non-responsibility part of the clause (being repugnant to Article III rule 2 and rule 8), while in the same time allowing the liberty part of the clause (being not contrary to the Rules), seems to be justified in the particular case by virtue of the provision which incorporates the Rules (as enacted in COGSA 1924) into the bill of lading contract in the *Svenska Traktor v Maritime Agencies* case. The clause, invoking the Rules, reads: *"If, or* ***to the extent that****, any terms (sic) of this bill of lading is repugnant to or inconsistent with anything of such Act or Schedule, it shall be void"* [emphasis added].

After having addressed these main points of criticism, it is important to say that the *Svenska Traktor v Maritime Agencies* cannot be regarded as an erroneous decision also in the light of a subsequent case – *The "Antares"* (1987), where unauthorized deck cargo was damaged during the journey but the fundamental breach argument of the cargo interests was conclusively denied.[103]

There are examples of other unusual clauses inserted by carriers in their bills of lading in an attempt to exclude their liability as well as ingenious legal devices which aim at compelling the shipper to assume the risk of damage resulting from on-deck carriage of the goods. This was the case in *Encyclopedia Britannica v The Hong Kong Producer*[104], where containerized cargo was received on board in apparent good order and condition, and it was stowed on deck under a "short form" bill of lading, which did not make any mention, notice or statement of deck carriage. However, this short form referred to the carrier's "regular form" bill of lading and expressly incorporated all of its terms.[105] The shipper Encyclopedia Britannica was unaware that most of the cargo was stowed on deck. Nor did he know of the regular bill of lading, which contained, among others, Clause 13:

> *13. Stowage On Deck, etc. […]*
>
> *The shipper represents that the goods covered by this bill of lading need not be stowed under deck and it is agreed that it is proper to and they may be stowed on deck unless the shipper informs the carrier in writing before delivery of the goods to the carrier that under deck stowage is required.*
>
> *With respect to goods carried on deck, all risk of loss or damage by peril inherent in or to incidental [sic] such carriage shall be borne by the shipper. . .*

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[103] *Kenya Railways v. Antares Co. Pte Ltd. (The "Antares") (Nos. 1 and 2)* – [1986] 2 Lloyd's Rep 626; [1987] 1 Lloyd's Rep 424, CA. See: *Section 4.2* above.

[104] *Encyclopedia Britannica, Inc. v The "Honk Kong Producer" and Universal Marine Corporation (The "Hong Kong Producer")* – United States Court of Appeals (Second Circuit) – Lloyd's Law Reports [1969] Vol. 2, p. 536.

[105] The short form bill of lading contained, *inter alia*, the following provisions: "This Short Form Bill of Lading is issued for the shipper's convenience and at its request, instead of the carrier's regular form of Bill of Lading. It shall have effect subject to the provisions of the U.S. Carriage of Goods by Sea Act, 1936 […] so far as they may be applicable. All the terms of the carrier's regular form of Bill of Lading are incorporated herein with the like force and effect as if they were written at length herein. A copy of such Bill of Lading may be obtained from the carrier, its agents or the master." See *The "Hong Kong Producer"* Ll. L. Rep. [1969] Vol. 2, p. 536, at p. 537, fn 2.

The carrier relied in his defence on that clause and contended that it allowed him to stow the goods on deck and, therefore, he was not in breach of contract and not liable for the damage to the cargo. However, the shipper received only the short form bill of lading, and no copy of the regular form was attached or issued together with it. Moreover, the short form was issued only after the cargo was already stowed on deck and, thus, the shipper had no opportunity to inform the carrier "in writing before delivery of the goods" that cargo should be stowed below deck as required by Clause 13. In effect, the clause assumed the features of an instrument which tacitly compelled an unaware shipper to unwillingly waive his right to have his goods stowed under deck and, thus, to waive virtually all his rights under the Hague Rules (in this case, the US COGSA) because, as shown so far, declared deck stowage is excepted from the Rules. The Clause Paramount inserted in the short form bill of lading also operated to that effect through the words "so far as they [the Rules] may be applicable", which suggested that should deck carriage took place, the shipment would not be governed by the statutory liability regime. To summarize, the clause lessened the carrier's liability and in the same time deprived the shipper of all the protection to which he was entitled under the Rules. The Court in that case ruled that Clause 13 was not an express agreement to stow on deck as the short form bill of lading did not indicate anything that the cargo would be stowed on deck. Therefore, the shipper was afforded with the statutory protection of the Rules (in this case, US COGSA), whereas the carrier was held to have issued a clean bill of lading and, by stowing the cargo on deck, he was in breach of the contract of carriage and was found liable.

In conclusion, it suffices to say that stowing cargo on deck under a "liberty to stow on deck" clause will nowadays not be a breach of the contract. What is more, the carrier is under no duty to inform the shipper that the liberty has been exercised unless this is specified in the contract.[106] However, when a bill of lading gives the carrier only an option to carry the goods on deck, but there is no on-deck statement on the face of the bill, the Hague or Hague-Visby Rules will still apply and the carrier will be under the obligation to "properly and carefully" load, stow and carry the goods, which will not be considered "deck cargo" within the meaning of Article I(c) of the Rules. This means that, by agreeing to the "liberty to stow on deck" clause, the shipper agrees with assuming the typical risks that relate to the carriage of cargo on deck but he does not agree with, and is thus protected from negligence on behalf of the crew or from the vessel becoming uncargoworthy or unseaworthy because of the deck cargo.

What is more, similarly to the position when there is a custom to carry goods on deck (*section 4.2*), a carrier cannot rely on a liberty clause inserted in the bill of lading in order to protect himself from claims for loss of or damage to deck cargo if deck carriage is done in breach of a pre-existing express contractual agreement to carry on deck. This could be the case where the parties stipulated in a charter party that the goods will be carried under deck but the carrier subsequently issues a claused bill of lading which provides the liberty to stow on deck.

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[106] See: *'Carver on Bills of Lading'* (2nd Edition), Sweet & Maxwell Ltd (2005), London, p. 556, para 9–113, fn. 53. See also *'Scrutton on Charterparties and Bills of Lading'* (20th edition), Sweet & Maxwell (1996), Article 88—Deck Cargo, p. 169.

On the other hand, unilateral declarations that take the form of clauses, which are disguised in another form of the transport document and kept away from the knowledge of the other party, do not constitute an agreement between the carrier and the shipper to stow goods on deck. In order to have a valid agreement for on-deck stowage, an informed consent on behalf of the shipper must be present. A weighty factor that courts take into account when establishing the level of knowledge of the shipper, is whether there have been any past dealings between the two parties.[107] What matters most, however, is the approach adopted in both cases *Svenska Traktor v Maritime Agencies* and *The "Hong Kong Producer"*, which requires strict compliance with the two conditions set forth in Article I(c) – the factual and also the contractual one.[108] Thus, the notation or statement on the face of the bill of lading must clearly state that the cargo "will" or "shall" be carried on deck, and not that it "may" be carried on deck.[109] The latter notation will provide the carrier with discretion as to the mode of carriage but, from the perspective of the shipper, the consignee, or the receiver this is not sufficient information regarding the way of carriage. No consignee will know for certain whether the cargo will be carried below or above deck if it is stated on the B/L that the carrier "may" carry it on deck.

Another important point is that clauses which allow a serious deviation from standard bill of lading provisions, such as the clause in *The "Hong Kong Producer"*, are subject to the *contra proferentem* rule.[110] This means that a term that is not a standard term in the bill of lading, but was drafted by the carrier, should be construed narrowly and against him.

5. The evolving views on deck cargo under English law: towards a less restrictive regime

5.1 The traditional deck cargo doctrine – the implied duty of the carrier to carry the goods under deck

Historically, the prohibition of loading and carrying cargo on deck dates back to early times. The Statute of Marseille (*Statuts Municipaux de Marseille*) from the year of 1253 decreed on-deck carriage unlawful, regardless whether or not it had been agreed beforehand by the parties.[111] Later on, in the 15th century, the Hanseatic League and the Italian City-State of Genoa also declared stowage on deck an improper practice in their laws.[112]

Since those early times, there has been a general rule that cargo should be carried below deck – either in the holds or in other usual carrying places – regardless

[107] See: *The "Mahia"* [1955] 1 Ll. L. L. Rep. 264 at p. 266; *The "Hong Kong Producer"* [1969] 2 Ll. L. Rep. 536 at p. 538; *Evans v Merzario* [1976] 2 Ll. L. Rep. 165, at p. 169.
[108] See: *section 5.1* below.
[109] *The Rhone: Analysis and Comments*, JIML 12 [2006] 1 13, at p. 14.
[110] A rule from the general contract law, which requires that the words to be construed should be construed against the party who drafted them. *Contra proferentem* (from Latin) means "against the offeror".
[111] J.M. Pardessus – *'Collection des Lois Maritimes Antérieures Au XVIIIe Siècle'*, Tome Quatrième (1837), p. 275.
[112] Christof F. Lüddeke – *'Marine Claims: A Guide for the Handling and Prevention of Marine Claims'*, LLP, 1996, ISBN-10: 1859780474, p. 42.

whether a bill of lading is issued.[113] Although this rule is nowadays not codified, it can be assumed that this is a general principle of maritime law, which, evidently, is derived from a long-standing custom that was passed on from port to port and has been uniformly applied. As pointed out by the learned Prof. Dr. Eric Van Hooydonk, general principles of maritime law constitute an important part of *lex maritima* as a source of maritime law.[114] While *lex maritima* is of little practical importance nowadays, it still exists as one of the sources of maritime law, together with the CMI and IMO conventions, the self-regulating character of maritime law, and also national legislation. To exemplify, Prof. E. V. Hooydonk lists some of the general principles of maritime law such as the freedom of navigation; the freedom of maritime contract (being subject to express mandatory rules); the fundamental distinguishing characteristics of a ship; the application of the law of the flag to the property law status of the ship; the general duty of care of maritime contracting parties; the essential characteristics of charter parties, the bill of lading, and the sea waybill; the authority, powers and responsibility of the master of the ship; the humanitarian treatment of crew and stowaways; the principle of general average; the principle of "no cure no pay" in salvage law; and the duty to care for the environment.[115] These general principles are universally accepted and have a binding force in both contractual usage and practice.[116] The principle of under deck carriage meets both of these requirements. Therefore, it follows that, according to the old doctrine on deck cargo, the carrier is always under the implied duty to stow the cargo below deck; this is his basic obligation.

This rule, however, is subject to two exceptions. The carrier is authorized to stow goods on deck only when (1) there is an express agreement between the parties to the contract of carriage to that effect, or (2) there is a universal custom that is binding within a particular trade, or port of loading, to carry the goods on deck.[117]

This general rule to stow below deck, subject to an express agreement or a universal custom, has materialized in the pre-Hague Rules case law. In the old case of *Royal Exchange Shipping v Dixon (1886)*[118], the House of Lords ruled that there is an implied term inherent in any contract of carriage that the carrier should stow the goods below deck even if this is not manifested in the contract. According to that judgment, unless there is a legal requirement to stow on deck, an express agreement between the parties to do so, or a custom or practice to that effect, the only authorized location to stow the goods is below deck. The case involved the carriage of 125 bales of cotton under four bills of lading. While three of the bills of lading stipulated that goods will be carried

[113] Eberhard P. Deutsch – *'Deck Cargo'*, Cal. L. Rev. 535 (1939).
[114] Professor Dr. Eric Van Hooydonk – *'Towards a worldwide restatement of the general principles of maritime law'*, (2014) 20 JIML 170. Prof. Hooydonk speaks of *lex maritima* as a specific part of the wider *lex mercatoria*. The former represents the foundations of general maritime law, and comprises of maritime customs, principles, codes, conventions and practices, which have existed up until the present time and which are not restricted internationally.
[115] Prof. Dr. E. V. Hooydonk – *'Towards a worldwide restatement of the general principles of maritime law'*, (2014) 20 JIML 170 at p. 180-181.
[116] Prof. Dr. E. V. Hooydonk – *'Towards a worldwide restatement of the general principles of maritime law'*, (2014) 20 JIML 170 at p. 173.
[117] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'* (20th edition), Sweet & Maxwell (1996), ISBN-10: 0421525800, Art. 88, p. 168.
[118] *Royal Exchange Shipping Co Ltd v Dixon* (1886) LR 12 App Cas 11.

under deck, the fourth bill was silent on that matter. The House of Lords held not only that the under-deck term would be implied to the fourth bill of lading, but that it would have been implied to all four bills had they all been silent with regard to the manner of stowage.

5.1.1 An agreement between the parties as an exception to the duty to carry under deck

In order to override the general principle of below-deck carriage, the carrier has to fulfil the onerous burden of proving that there is an express agreement with the shipper that the goods will be carried on deck. Even when on-deck carriage is stated on the face of the bill of lading, that statement may not be held to express the true consent of the shipper to such an arrangement. The express agreement must not only be stated on the face of the bill of lading, but it must also be tantamount to a genuine and informed consent, clearly expressed by the shipper prior to sailing.[119] The reason why only a clear on-deck provision in the bill of lading is considered an express agreement is that such a clause provides certainty to the parties and allows them to assess their risk and responsibility over the cargo.

A clean bill of lading issued by the master certainly precludes the carrier from proving that there has been an agreement between the parties to carry the cargo on deck.[120] Even adducing any extrinsic evidence or oral testimony, in order to substantiate an on-deck agreement, will be futile and of no avail because of the basic principle that a clean bill of lading is an express agreement itself that the goods shall be carried below deck.[121] This implies that a clean, or *unclaused*, bill of lading refers not only to the condition of the goods but also to the location where they are to be stowed – under deck.

Exceptionally, in certain very unusual circumstances an oral promise of assurance to carry the goods below deck can be an enforceable contractual promise.[122] The promise in *Evans v Merzario* was held binding against the specific background of the case – an assurance of below-deck carriage was given to the cargo owners, because, based on past dealings between the parties, this was the only condition upon which the cargo owners would have agreed to the carriage.[123] Here, the defendant was not the carrier but the freight forwarding company. The promise was used by the forwarding agent to induce the cargo owners to continue doing business together on the same terms, notwithstanding that the cargo of machines was now to be transported in containers instead of, as it had been previously, in crates on trailers.

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[119] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), ISBN: 978-2-89635-126-8, p. 1573.

[120] See: *Section 5.2.1* below.

[121] Eberhard P. Deutsch – *'Deck Cargo'*, Cal. L. Rev. 535 (1939) at p. 546.

[122] *J. Evans & Sons (Portsmouth) Ltd. v Andrea Merzario Ltd. (Evans v Merzario)* – Court of Appeal (Lord Denning, M.R., Lord Justice Roskill and Lord Justice Geoffrey Lane) – Lloyd's Law Reports [1976] Vol 2, p. 165. This was a very peculiar case, where the defendants were the forwarding agents and not the carrier; the latter validly carried the cargo on deck under a master's bill of lading stating on its face "Shipped on deck at shippers risk". What the plaintiff cargo owners disputed was actually the printed conditions of the house bill of lading issued by the freight forwarder, coupled with the express promise, which he had given to the plaintiffs at a business meeting that their container would be carried under deck.

[123] Given the circumstances, the oral agreement was portrayed by the Honourable Lords as the following: *"If we continue to give you our business, you will ensure that those goods in containers are shipped under deck"*. See Lord Denning M.R. in *"Evans v Merzario"* [1976] 2 Ll. L. Rep. 165 at p. 168-169.

Although considered a binding obligation, the oral agreement did not constitute a collateral contract varying the terms of the written contract but it was *"a new express term which was to be included thereafter in the contracts between the plaintiffs and the defendants"*.[124] Thus, the oral promise was interpreted as a legally binding new term, which was added to the standard printed conditions of the contract, and which the freight forwarders breached by accepting on-deck master bills of lading.

However, when a carrier fails to prove an agreement with the cargo owners for on-deck carriage, and even when a clean bill of lading is issued, the carrier is still permitted to prove an existing accepted custom to carry goods on deck within a specific trade (see *section 3.2*). This is also what the freight forwarders in *"Evans v Merzario"* attempted to establish, although unsuccessfully – a customary practice to stow on deck in the then new container trade, which would have rendered the law on deck cargo inapplicable to the particular shipment.[125]

5.1.2 A universal custom within a particular trade to carry the goods on deck

The second exception to the under-deck rule is a pre-Hague Rules principle and is of little importance nowadays. It allows deck carriage in cases when there is a generally recognized custom within a particular trade that the goods may be stowed on deck. This means that, for certain goods, and provided that such a universal custom is present, the bill of lading doesn't have to state that the cargo will actually be carried on deck.

In *Royal Exchange Shipping v Dixon*, the owners of the screw steamer the *Egyptian Monarch*, carrying some of her cargo on deck from New Orleans to Liverpool, attempted to prove a custom to stow on deck. They relied on the practice of vessel owners who were trading between these two ports and who shipped goods on deck in violation of their contract of carriage, while accepting full responsibility for the consequences. However, the Honourable Law Lords held that, since the shipowners agreed to pay any damages resulting from this extensive practice established in Liverpool, the practice was actually tantamount to nothing more than a habit of stowing goods on deck in breach of the contract with the shipper and, thereafter, of paying for that breach.[126] Moreover, even if the cargo interests had been aware of that practice of deck shipment and had not objected to it, they would not have been regarded as having consented to a deck-carriage modification of their bills of lading contract, for *"their non-interference merely implies that they do not think it necessary to prevent a deviation from the contract, because they are satisfied of the shipowner's ability to make good all loss arising from his having broken it"*.[127]

To constitute a custom within a trade to carry cargo on deck, there must be something more than a frequent deck carriage. In *Royal Exchange Shipping v Dixon*, it was noted that, to establish such a custom, the evidence on the case must indicate a practice or usage which is general and universal within a certain trade and at the port of shipment, and which is known by anyone who is involved in this particular trade:

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[124] See Geoffrey Lane, L.J. in *"Evans v Merzario"* [1976] 2 Ll. L. Rep. 165 at p. 170.
[125] On the carriage on deck of containerized cargo, see section 4.3.
[126] *Royal Exchange Shipping Co Ltd v Dixon* (1886) LR 12 App Cas 11, Lord Halsbury L.C. at p. 16.
[127] *Royal Exchange Shipping Co Ltd v Dixon* (1886) LR 12 App Cas 11, Lord Watson at p. 18.

> *It is suggested that there is a practice which it must be taken that they knew. Now the only practice which it can be taken in law that they impliedly knew (that is, taken that they knew, although they did not) is a general practice; so general and universal in the trade and at the port from which these goods were taken, that everybody who ships cotton on board a ship at New Orleans for England must be taken to know that his goods probably will, or may probably be put on deck. […] To say that there is a practice, or to say that there is a frequent practice, is only to say that it is sometimes done, leaving it open that as often, or oftener, it is not done. Such evidence as that is not evidence to go to a jury, upon which they would be justified in finding a general usage.* [128]

It can be concluded that in order to be relied on a universal custom within a particular trade (a trade purpose or port customs), there must be established a general and universal practice so that the particular trade is considered "customary". In this way, any cargo owner will be aware that his goods are likely to be stowed on deck.

However, relying on a universal custom to excuse on-deck carriage is a pre-Hague Rules principle and it has little application nowadays. This is because the Rules are not silent on that matter but explicitly require in Article I(c) that the goods should be explicitly stated on the bill of lading as carried on deck and also be so carried if parties want to exclude the application of the Rules in their contract. Therefore, under the Hague and Hague-Visby Rules, the carrier cannot excuse himself for deck carriage, relying on this old principle. [129]

Under charter parties, however, it is deemed permissible to load cargo on deck where the vessel is specially designed for such carriage. [130] In certain cases deck carriage is justified because of technological innovation and vessel design – *e.g.* purpose-built container vessels or other vessels designed for carriage on deck. For example, if a semi-submersible vessel is carrying a platform, there will be no need to state anything in the bill of lading about the deck carriage. It is, of course, inconceivable to stow the platform in the ship's holds.

5.1.3 Deck carriage and the doctrines of fundamental breach and deviation

5.1.3.1 Fundamental breach

The doctrine of fundamental breach provides that if a party has committed a breach that goes to the root of the contract, there exists a rule of law which deprives the party at fault of any of the clauses set forth in the contract that are intended to except or limit that party's liability for his failure to perform. The doctrine has its commercial origin in the 19th century and was applied in cases of serious contractual breaches such as a geographical deviation from the voyage or storing the goods in a different warehouse to the one agreed for in the contract. In such cases even causation was not necessary to trigger the application of the doctrine – the fact that loss or damage was not caused by

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[128] *Royal Exchange Shipping Co Ltd v Dixon* (1886) LR 12 App Cas 11, Brett M.R.

[129] This is not the case, however, with the Hamburg Rules, which, in Article 9(1) on deck cargo, provide that deck carriage is allowed not only if it is in accordance with an agreement with the shipper or if it is required by statutory rules or regulations, but also if it is in accordance *"with the usage of the particular trade"*.

[130] Julian Cooke, Tim Young, Michael Ashcroft, Andrew Taylor, John Kimball, David Martowski, LeRoy Lambert, Michael Sturley – '*Voyage Charters*' (4th Edition, 2014), p. 168.

the fundamental breach was not a defence for the carrier. This was a much preferred and used rule of law in the past and up until the two milestone decisions House of Lords cases (*Suisse Atlantique* and *Photo Production*) which marked a cardinal change.[131]

Today, however, there has been a significant development in shipping law with respect to deck carriage and the doctrine of fundamental breach of the contract. This can be observed both in legal literature and in case law. To begin with, earlier editions of *Scrutton on Charterparties and Bills of Lading* contained a passage, rendering unauthorized deck carriage equal to a fundamental breach:

> *The effect of deck stowage not so authorized will be to set aside the exceptions of the charter or bill of lading, and to render the shipowner liable under his contract of carriage for damage happening to such goods.*[132]

This approach[133], however, is now considered old law because the doctrine that a breach of the contract can be of such a fundamental nature as to discharge all exceptions clauses, is no longer considered to exist after it was addressed and rejected in *The "Antares".*[134] In the vivid legal parlance of Lord Justice Lloyd, the death knell of the fundamental breach doctrine sounded in the *Suisse Atlantique* case[135], while its corpse was buried in *Photo Production v Securicor.*[136]

In the former case, it was established that the freedom of contract would be excessively restricted if there was a rule of law, which supported the prohibition and nullification of contractual defences in case of a fundamental breach.[137] The Court suggested that the terms and scope of the exception clause should be considered on a case-by-case basis, and that the contract of carriage should be construed as a whole, before establishing whether or not the exemption clauses were admissible to protect the carrier in the circumstances of a fundamental breach.[138]

The House of Lords in *Photo Production v Securicor* confirmed this proposition, namely that it is a matter of construction of the contract when it comes to whether and to what extent limitation and exclusion clauses are to be applied to a case of fundamental breach or breach of a fundamental term.[139] Lord Wilberforce expressed his opinion that, no matter of the complexity of the case and of the contractual breach, the normal rules of contract law have plenty of resources to deal with these problems; hence,

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[131] Dr. Susan Hodges and David A Glass – *'Deck Cargo: Safely stowed at last or still at sea?'*, reprinted in *'The Carriage of Goods by Sea under the Rotterdam Rules'* (edited by D Rhidian Thomas), London (2010), at p. 240.

[132] Sir Thomas Edward Scrutton, Sir Alan Abraham Mocatta, Sir Michael J. Mustill, Stewart C. Boyd – *'Scrutton on Charterparties and Bills of Lading'* (19th edition), Sweet & Maxwell (1984), ISBN: 0421297107, at p. 167.

[133] The cases *Mallet v Great Eastern Railway Company* [1899] 1 Q.B. 309, *Gunyon v South Eastern and Chatham Railway Companies' Managing Committee* [1915] 2 K.B. 370, and *Lilley v Doubleday* (1881) 7 Q.B.D. 510 are all examples where the fundamental breach argument was held valid, meaning that a party that was guilty of such a breach could not rely on his contractual protections and defences.

[134] See Lord Justice Lloyd in *The "Antares"* [1987] 1 Lloyd's Law Reports 424, at p. 429.

[135] *Suisse Atlantique Societe D'Armement Maritime S.A. v N.V. Rotterdamische Kolencentrale* [1966] 1 Lloyd's List Law Reports 529.

[136] *Photo Production Ltd. v Securicor Transport Ltd.* [1980] 1 Lloyd's Law Reports 545. This was not a maritime case but a contract law case.

[137] *Suisse Atlantique v N.V. Rotterdamsche* [1966] 1 Lloyd's List Law Reports 529 at p. 541.

[138] *Suisse Atlantique v N.V. Rotterdamsche* [1966] 1 Lloyd's List Law Reports 529 at p. 541. (*ibid.*)

[139] *Photo Production v Securicor* [1980] 1 Lloyd's Law Reports 545, at p.549.

there was no need of a specific rule of law to be judicially devised and applied to cases of fundamental breach.[140] Thus, *Photo Production v Securicor* explicitly rejected the fundamental breach doctrine by preferring the "rule of construction" approach.

The judgment in *The "Antares"* relied on these two cases and disapproved the rule related to deck cargo as set out in the earlier editions of *Scrutton on Charterparties and Bills of Lading*. The Court found no reasons to regard unauthorized deck stowage as a special case that is tantamount to a fundamental breach. Accordingly, this led to a change of the relevant passage in *Scrutton* so that later editions now represent the current law on deck carriage. Considering the developments stated in the cases hereinabove, the new passage has been considerably amended and it formulates the legal effects of unauthorized deck carriage as follows:

> *The effect of deck stowage not so authorized is to render the shipowner liable under his contract of carriage for damage happening to such goods caused by such stowage. Whether exceptions […] apply to protect the shipowner is now a matter of construction…* [141]

It is explicitly affirmed that there is no rule of law which renders carriage on deck a fundamental breach, depriving the carrier from all exceptions and limitation clauses.[142]

The approach based on the "rule of construction" indeed does not nullify carrier's defences but it doesn't automatically uphold them, either. If exceptions clauses are devised to protect the carrier, provided that he honoured his obligation under the contract to carry below deck, then these clauses will not be available to him if he is in breach of these obligations and the wording of that clause does not cover such a breach.[143] Conversely, if the clauses are envisaged to encompass cases when the contract has been breached by wrongfully stowing the goods above deck, then the clauses will be upheld. Expressed in *The "Chanda"*, this rule is based on contractual intention and it has been applied and preferred over the fundamental breach doctrine in several pivotal cases related to deck carriage such as *Royal Exchange Shipping v Dixon*, *Evans v Merzario*, *The "Antares"*, and *The "Chanda"*.[144] However, the rule actually does no more than stating the obvious, and it fails on providing any guidance as to which exemption and limitation clauses are devised to protect the carrier in cases of wrongful on-deck carriage and which are not. Nevertheless, for the purpose of the current section, the merits of this assertion are that it confirms the death of the fundamental breach doctrine and upholds the application of the rule of construction in cases of unauthorized carriage on deck. As to the defences that are available to a carrier who breached his obligation to carry below deck, these will be discussed in section 4.5 *infra*.

There is another argument for considering unauthorized deck carriage not a fundamental breach. And this argument lies in the beginning of Article III rule 2 of the

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[140] *Photo Production v Securicor* [1980] 1 Lloyd's Law Reports 545, at p.549. (*ibid.*)
[141] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'* (20th edition), Sweet & Maxwell (1996), ISBN-10: 0421525800, at p. 168.
[142] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – 'Scrutton on Charterparties and Bills of Lading' (20th edition), Sweet & Maxwell (1996), ISBN-10: 0421525800, at p. 168. (*ibid.*)
[143] *The "Chanda"* [1989] 2 Lloyd's Law Reports 494, at p. 505.
[144] *The "Chanda"* [1989] 2 Lloyd's Law Reports 494, at p. 505. (*ibid.*)

Hague/Hague-Visby Rules, which is invariably in the focus of the current thesis. The article, which sets forth the cargo-related obligations of the carrier, begins with the following proviso: *"subject to the provisions of Article IV"*. So, on the one hand, we have undeclared, *i.e.* unauthorized, deck carriage (that is, when there is no express agreement to stow on deck), which is considered to constitute a breach of Article III rule 2, and on the other hand we have the duties stated therein (to *"properly and carefully load … stow, carry … care for … the goods carried"*) to be subject to the exemptions and defences in Article IV. Therefore, unauthorized deck cargo cannot be considered a fundamental breach of the contract, but a only a breach, in respect of which the carrier can escape from liability by means of resorting to the defences provided in the Rules. The extent, to which a carrier can escape liability, depends, of course, on the specific circumstances and factual matrix of the case as well as on the rules of construction employed by the court.

5.1.3.2 Deviation

The doctrine of deviation originates from marine insurance law, where a vessel was deprived of her insurance cover if the shipowner geographically departed from the commercial route or unduly delayed the journey.[145] This was so because the insurers were not willing to cover risks that lie outside the prompt execution of the journey on the usual commercial route. The doctrine of deviation is a variation of the same doctrine on fundamental breach.[146] With regard to the application of the doctrine from a practical perspective, shippers often utilize it in an effort to avoid statutory liability limitations such as the per package limitation in Article IV rule 5 of the Hague-Visby Rules.

In America, the doctrine of deviation has expanded from a geographical concept to embrace also fundamental contractual aberrations.[147] Thus, on-deck carriage under a bill of lading, which does not expressly state that the cargo will be loaded on deck, is considered a technical, rather than a geographical deviation.[148] A technical deviation, also known as a quasi-deviation, indicates any variation in the conduct of the vessel, which increases the risk over the goods carried.[149] The consequences of a deviation are, in general, that a carrier cannot rely on the defences laid down in the bill of lading or in the Hague Rules and Hague-Visby Rules, except when the deviation was reasonable (Article IV rule 4), which is deemed to be a question of fact. A quasi deviation has the same results as the geographical deviation, because, under American law, the former is considered a fundamental breach, meaning that, in case of unauthorized deck carriage, the carrier is deprived of all of his benefits, defences, limitations and exclusions under

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[145] James F. Whitehead – *'Deviation: Should the Doctrine Apply to On-Deck Carriage?'*, 6 Mar. Law. 37 (1981).

[146] See Viscount Dilhorne in *Suisse Atlantique v N.V. Rotterdamsche* [1966] 1 Lloyd's List Law Reports 529 at p. 540: *"[D]eviation is a fundamental breach – or a breach of a fundamental term…"*

[147] James F. Whitehead – *'Deviation: Should the Doctrine Apply to On-Deck Carriage?'*, 6 Mar. Law. 37 (1981) at p. 38: *"Deviation [under COGSA] has come to mean any breach of contract of carriage so fundamental that a shipper of cargo would be justified in considering the contract repudiated."*

[148] Christof F. Lüddeke – *'Marine Claims: A Guide for the Handling and Prevention of Marine Claims'*, LLP, 1996, ISBN-10: 1859780474, p. 42.

[149] Note that the doctrine of deviation is not addressed or defined by the Hague Rules or the Hague-Visby Rules. The only reference to deviation can be found in Article IV rule 4: *"Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom."*

the bill of lading.[150] Likewise, the carrier is deprived of many of his rights under the US COGSA, such as the limitation of liability (s.1304(5)) and the carrier-friendly presumption laid down in s.1303(6), except, however, for the one-year time limit.[151] This was the case in *American Dornier Machinery Corp and Anr v "MSC Gina" and Ors*[152] before the US District Court where the carriage of containers full with delicate and sophisticated equipment on the deck of a specially-designed containership was held to be a deviation because of a previous express agreement between the shipper and the carrier that, unless the cargo was stowed below deck, the shipper would be *a priori* informed for the impossibility of under-deck stowage, and the latter could choose to allow the shipment on deck, reschedule the shipment for another vessel, or cancel the booking and make an arrangement with another carrier without any penalty. Thus, the agreement did not provide the carriers with the liberty to stow on deck at their option but they had to communicate this with the shippers. This special agreement for under-deck stowage formed part of the contract of carriage, and, by breaching it, the carriers MSC breached a contractual term that goes to the root of the contract, which deprived them of all the defences under US COGSA, including the package limitation defence of $500 per package. However, the court allowed that the carriage of containers on the deck of specially-designed containership under a clean bill of lading was not considered an unreasonable deviation, pointing to previous cases,[153] but in the present case such carriage was coupled with a special stowage agreement which was part of the contract of carriage.

The question of whether on-deck carriage of containers on a specially-designed container vessels amounted to an unreasonable deviation was discussed and decided in the earlier American case *The "Mormacvega"*.[154] Two shipping containers with pallets of liquid "Teflon" were carried on deck from New York to Rotterdam under a clean bill of lading, absent a contractual provision or established custom to carry on deck. One of the containers was lost during the voyage. The first-instance court held that, given the fact that the *Mormacvega* was originally a general cargo ship but then converted into a combined vessel capable of carrying break bulk and containers, on-deck stowage was permitted. These substantial structural changes led the court to believe that the "[c]ontainers on the deck of the *Mormacvega* were not necessarily subject to greater risks than those stowed under deck".[155] Thus, the court made an exception to the *per se* doctrine on unreasonable deviation for containerized vessel. The factual inquiry performed by the court in this case also shows how important the ship design is in determining the risk that pertains to the carriage of cargo on deck.[156] Furthermore, the

[150] David A. Glass – *'Freight Forwarding and Multimodal Transport Contracts'* (2013), 2nd edition, Informa Law from Routledge, ISBN-13: 978-1842145951, p. 437, para 4.102.
[151] David A. Glass – *'Freight Forwarding and Multimodal Transport Contracts'* (2013), 2nd edition, Informa Law from Routledge, ISBN-13: 978-1842145951, p. 437, para 4.102.
[152] *American Dornier Machinery Corp and Anr v "MSC Gina" and Ors* - US District Court (SDNY) (Owen DJ) - 16 October 2001 – (2002) 579 LMLN 3.
[153] See: *Du Pont de Nemours International SA v SS Mormacvega* 493 F2d 97 (2d Cir 1974); [1973] 1 Lloyd's Reports 267; [1974] 1 Lloyd's Reports 296. For the carriage of containerized cargo, see *Chapter V*.
[154] *Du Pont de Nemours International SA v SS Mormacvega*, U.S. District Court for the Southern District of New York - 367 F. Supp. 793 (S.D.N.Y. 1972); U.S. Court of Appeals, Second Circuit - 493 F2d 97 (2d Cir 1974); [1973] 1 Lloyd's Reports 267; [1974] 1 Lloyd's Reports 296.
[155] *The "Mormacvega"*, [1973] 1 Lloyd's Reports 267, at p. 272.
[156] See section 4.1 (*Factual study*) above.

Court of Appeal agreed with and affirmed the decision of District Court, which was based, *inter alia*, on the following points: there was no oral agreement to require the carrier to stow below deck; the deck of a container vessel was exactly where shipping containers are reasonably to be carried; the vessel was specifically constructed to safely permit on-deck carriage of containers.[157]

Under English law, the application of the doctrine of deviation is considered highly uncertain and it is submitted that the doctrine's scope is narrower, meaning that less events may be characterized as deviation under English law as compared to American law.[158] Earlier English cases generally considered deviation as a breach, which goes to the root of the contract, and as such it made the carrier unable to rely on his limitation or exclusion clauses. A propos, some English authors also described undeclared deck carriage as akin to deviation.[159] However, early English cases are nowadays not considered to have established grounds for a rule of law which embodies the principle employed in those cases.[160] Thus, deviation is not considered a special case but it rather obeys the ordinary principles of contract law.[161] What is more, nowadays there is no English authority which considers the wrongful deck on deck as a deviation.[162] Moreover, carriage on deck was not held equivalent to an automatic case of *res ipsa loquitur*.[163] The mere fact that goods are stowed on the weather deck does not mean in and of itself that the contract or the Rules have been breached. There must be a causal connection between the deck stowage and the damage or loss of such goods.[164]

With regard to other jurisdictions, the deviation principle does not apply in relation to deck cargo in the Netherlands, France, or Italy, where courts have decided that the carrier can rely on the Article IV rule 5 to limit his liability in deck cargo cases.[165]

5.2 Interpreting the bill of lading

Before rushing into the question of how courts interpret the various bills of lading provisions as well as of how far carriers may go to exclude their obligation to stow below deck or to limit or except their liability for unauthorized deck carriage, consideration must be given to a wider observation. In the following sections, one peculiarity will transpire about the legal consequences of deck carriage, and it is that the central problem in disputes, involving cargo carried on deck, is actually related to what the carrier has agreed to rather than to what he has actually done. As stated by the

[157] *The "Mormacvega"*, [1974] 1 Lloyd's Reports 296.
[158] *Extension of Time, Deck Stowage and Time Bar (The Antares): Case and Comment* – Lloyd's Maritime and Commercial Law Quarterly (1987), p. 146, at p. 147.
[159] N.J.J. Gaskell, C. Debattista, and R.J. Swatton – '*Chorley and Giles' Shipping Law'* (1987), Eighth Edition, p. 237, para 12.6.1.
[160] *Suisse Atlantique v N.V. Rotterdamsche* [1966] 1 Lloyd's List Law Reports 529 at p. 545.
[161] *Suisse Atlantique v N.V. Rotterdamsche* [1966] 1 Lloyd's List Law Reports 529 at p. 545. (*ibid.*)
[162] *The "Kapitan Petko Voivoda"* [2003] 2 Lloyd's Law Reports 1, at p. 12, para 12.
[163] Latin for "the thing speaks for itself", describing a doctrine of law where the duty of care and breach can be inferred by the nature of the accident even if there is no direct evidence of an act of negligence. See *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton), Ltd.* [1953] 2 QB 124, at p.133.
[164] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'* (20th edition), Sweet & Maxwell (1996), ISBN-10: 0421525800, Article 88, p. 168.
[165] See: *The Kapitan Petko Voivoda*, CA, para 14; LL. L. Rep. [2003] p. 12-13, para 14.

Honourable Madam Levine J., the main goal of a commercial contract is to allocate among the parties the risks pertaining to the transaction, and, where the contract is insufficiently clear, it is up to the courts to establish who will bear the losses.[166] It is very important to identify what the parties have agreed to, because these contractual arrangements (in this case, the location where the goods will be stowed) create different obligations for the parties.

The main issues related to the carrier's implied obligation to stow the goods below deck are actually to be found in the bill of lading and its content. The transport document may contain provisions related to deck carriage, on the basis of which bills can be provisionally summarized into four categories: firstly, the bill of lading may expressly prohibit the carriage of goods on deck; secondly, it may allow carriage on deck by expressly stating that the cargo will be carried so; thirdly, it may only give an option, or a liberty, to the carrier to stow the goods on deck; lastly, the bill of lading may not address the matter of deck carriage at all, meaning that the master has issued a clean/unclaused bill of lading.

5.2.1 Issuing a clean bill of lading

It was already outlined that there is a general principle prescribing that a clean bill of lading requires that the goods shall be carried below deck. Although nothing in the Rules specifically stipulates so, this basic principle existed well before the Hague and the Hague-Visby Rules, as discussed in *section 5.1* above, and it stems from the implied duty of the carrier to carry the goods under deck. Hence, whenever the contract of carriage is silent on where the goods shall be stowed, and provided that there is no agreement, custom or a statutory obligation to stow on deck, it is generally understood that the actual place of carriage will be below the weather deck of the vessel.

The lack of a provision in the Hague-Visby Rules which explicitly stipulates the aforementioned requirement does not preclude one to infer that the Rules, too, postulate under-deck stowage when clean bill of lading is issued. This assumption can be made by reading together the Hague-Visby's Article III rule 2, which obliges the carrier to stow the goods "properly and carefully", and the basic principle of below-deck stowage, which has for a long time been recognized as the proper way of stowing the goods.

It should be noted in that regard that while this section of the chapter focuses on the part of the bill of lading which addresses where cargo will be carried, in practice most bills of lading are actually silent as to the location of the goods. The reason why bills of lading usually do not expressly state whether the goods will be carried below deck or on deck is a commercial one. If the transport document is qualified with a statement for on-deck carriage, this may be problematic for the underlying contract of sale, in particular where the latter provides for a transaction effected through a documentary credit, which is known also as a Letter of Credit.[167] Sellers and buyers of goods very often resort to this type of a credit payment arrangement, because, by using a Letter of

[166] *The "Rhone"* (2003) BCCA 39 (Court of Appeal for British Columbia), at p. 3, para [1].

[167] The Letter of Credit, known also as a documentary credit, is a written instrument issued by a bank at the request of its customer, the buyer of the goods, guaranteeing that the bank will pay to the seller for the goods or services rendered, provided that the seller presents all required documents and meets all terms and conditions as stated in the Letter of Credit. Thus, the bank deals only with documents and not with goods. The Letter of Credit is a very important mechanism of payment in today's international trade.

Credit, the risk of non-payment falls on the issuing bank and not on the seller, whereas the buyer, on the other hand, is satisfied that the seller will be paid only if all terms and conditions in the Letter of Credit are met. Because the risk of non-payment falls upon them, banks are unwilling to accept claused bills of lading, stating that cargo will be carried on deck and, thus, jeopardizing the transaction.

5.2.2 Issuing a claused bill of lading

The strict approach applied in *Svenska Traktor v Maritime Agencies* and *The "Hong Kong Producer"* to liberty clauses and to ambiguous clauses in bills of lading, which lack an express on-deck statement, has been elaborated and expanded in *The "Rhone"*, where there was actually an on-deck notation on the bill of lading.[168] The case concerned the carriage of 1725 packages of lumber from Canada to Belgium, subject to the Hague-Visby Rules. Roughly half of the packages were consigned to receiver A, while the other half to receiver B. The lumber within the packages had differing measurements and differing price. Each of the two consignments were on a separate bill of lading but both bills contained the notation "Stowage: 86% OD [on deck] 14% UD [under deck]", which reproduced the notation on the mate's receipt and referred to the entire shipment. The bills contained exclusion clauses as well, stating that cargo carried on deck was at the risk of the cargo owners and the carrier was not to be held liable for loss or damage. The cargo in its entirety was loaded and carried both below and above deck, in accordance with the proportions laid down in the bills of lading. During the voyage, more than half of the shipped lumber was damaged, and it was later discovered that all of the damaged lumber was among the packages that were carried on deck. Some of the damaged packages were consigned to purchaser A, while others to purchaser B. The main question that appeared before the Canadian Court was whether the packages stowed on deck could be considered "goods", and thus covered by the Hague-Visby Rules, or whether they were "deck cargo" within the meaning of Article I(c) and thus exempted from the Rules, which would enable the carrier to rely on the liability exclusion clauses.

Both the first instance court and the Court of Appeal were unanimous that the on-deck notation on the bills of lading was not clear as to exactly which part of the cargo was carried on deck and which was not. The information on the bill of lading was in percentages and was precise with regard to volume but it was not certain with respect to value of the cargo. Such uncertainty in the notation was held to be equivalent to the absence of a notation in *Svenska Traktor v Maritime Agencies*, and, therefore, the same principles applied to the present case.[169] In particular, the problem in *The "Rhone"* was that the notation on the bills of lading referred to the entire shipment of lumber, and it could not be relied on with respect to each consignment, because the specific packages that were to be carried below and above deck could not be identified at the time when the contract was concluded. Thus, consignees could not determine the value of the cargo which was carried on deck and could not assess the respective risks which were involved in the particular bill of lading contract.

Therefore, the Court held that no part of the shipment could be considered "deck cargo" within the meaning of the Rules. The notation was not sufficient to exclude the

[168] *Timberwest Forest Ltd v Gearbulk Pool Ltd (The "Rhone")* – 2003 BCCA 39 (Court of Appeal for British Columbia) – [2005] 681 LMLN 2.
[169] *The "Rhone"* (2003) BCCA 39 (Court of Appeal for British Columbia), at p. 17, para [42].

goods carried on deck from the application of the Hague-Visby Rules in accordance with Article I(c), and as a result the carrier could not rely on the liability exclusion clauses in the bills of lading. This case illustrates how important the aforementioned factors[170] are and how they come into play when courts are evaluating whether a particular shipment qualifies for "deck cargo" within the meaning of the Hague-Visby Rules. Here, the court put great emphasis on the communication between the parties regarding the intended deck carriage, which was not sufficient to allow the cargo owners to evaluate the risks and to make an informed decision. Thus, since the carrier failed to properly communicate the risks pertaining to that shipment, the court found the carriage objectionable and not conforming to the requirements of the Hague-Visby Rules for "deck cargo".

Several other implications could be drawn from that ruling. First of all, the on-deck notation or statement should be reliable for the respective shipment covered by the bill of lading and it should be clear and certain. *The "Rhone"* proves that even when there is a notation on the bills of lading, which states that the goods will be carried on deck, the results may still be the same as if there was no notation at all, if that notation is uncertain as to exactly which cargo will be carried above deck. Parties must be able to calculate with certainty the distribution of the risk between the cargo interests and the carrier. What is more, the shipper and the consignee, must be capable to calculate and assess their risks prospectively at the time of contracting, and not retrospectively after the damage has already been caused.[171]

5.3 Deck cargo and the obligation to care for the goods (Article III rule 2)

It has been established that stowage in an inappropriate way may still be a breach of Article III rule 2 when it relates to cargo carried on deck even if there is an agreement that the cargo will be carried on deck but no express statement to that effect on the bill of lading. As already pointed out, unauthorized deck carriage constitutes a breach of Article III rule 2 in and of itself, whereas carriage, which has been agreed via a liberty clause to be performed on deck but absent a statement to that effect on the B/L, is not automatically considered breach of Article III rule 2. However, that may well be the case if the obligations stated in that article have not been discharged "properly and carefully".

In the abovementioned case *Svenska Traktor v Maritime Agencies*, the carrier shipped 50 tractors, of which 16 were stowed on deck the motor vessel *Glory*, and during the journey from Southampton to Stockholm one of the tractors was lost overboard in normal weather conditions. The Judge established that the first part of the liberty clause in the bill of lading allowed the shipowners to stow the goods on deck subject, however, to their obligation under Art III rule 2 properly and carefully to load, handle, stow, carry, keep and care for the goods. The evidence on that case proved that the tractor was lost as a result of poor stowage, and lack of reasonable care in lashing the cargo to the deck, indicating a breach of Article III rule 2, therefore.[172]

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[170] See section 3 on the position under the Hague-Visby Rules.
[171] *The Rhone: Analysis and Comments*, JIML 12 [2006] 1 13.
[172] *Svenska Traktor Aktiebolaget v Maritime Agencies (Southampton), Ltd.* [1953] 2 QB 124, at p. 133-134.

Similarly, in the Canadian case *The "Mahia"*[173], the plaintiff shipowners sought to establish an agreement between them and the shipper to carry dangerous goods on the deck of their vessel *The Mahia*. The case concerned the shipment of drums of sodium chlorate from Montreal, Canada to Melbourne, Australia where the drums, after an incident-free voyage, ignited upon discharge and the explosion damaged the vessel and caused a loss of life. It is noteworthy that the respective Canadian regulation for the carriage of dangerous goods in ships allowed the carriage of such goods on or under deck. Clause 12 of the export through bills of lading also allowed deck carriage and incorporated the Water-Carriage of Goods Act (1936), *"notwithstanding Article I (e) of the Rules"*. The shipowners, furthermore, relied on the fact that the bills contained the notation *"On deck at shipper's risk"* in order to prove that they were given instructions by the shipper to stow the drums with the hazardous cargo on deck.

Considering all evidence and testimony[174], the Superior Court of Montreal held that the notation *"On deck at shipper's risk"* alone was not enough evidence to prove that the plaintiff shipowners were instructed by the shipper to stow on deck, nor was it enough to establish an agreement to ship on deck. On the contrary, the reason for the explosion upon discharge was found not to originate from the on-deck carriage *per se* but from the failure of the shipowners to properly and carefully discharge their obligations under Article III rule 2. The master of the vessel was knowledgeable of the hazardous properties of sodium chlorate, in particular that it is soluble in water and as such it should be packed in watertight containers if carried on deck, and yet it was easily noticeable that the lids of the sodium chloride drums stowed on *The Mahia* were not watertight.[175] Evidence also showed gross negligence and want of reasonable care during discharge operations, which was a direct cause of the accident. Consequently, the carrier was hold in breach of his obligations properly and carefully to load, handle, stow, carry, keep, care for and discharge the goods. The fact that the carrier had previously shipped thousands of tons of this particular cargo suggested that he knew or ought to have known the properties of sodium chlorate and, therefore, he could not rely on the defences provided in Article IV. Although the Court does not elaborate, it may seem fair to conclude that had the carrier not been knowledgeable of the hazardous cargo's properties, he may have been entitled to the defence set forth in Article IV rule 6 of the Rules.[176]

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[173] *Shaw Savill & Albion Company, Ltd. v Electric Reduction Company of Canada, Ltd., and Imperial Chemical Industries of Australia and New Zealand, Ltd. (The "Mahia")* – Superior Court of Montreal (Associate Chief Justice W.B. Scott) – 29 December 1954 – Lloyd's List Law Reports [1955] Vol. 1, p. 264.

[174] On the one hand, the correspondence between the carrier's agent and the shipper did not suggest any agreement between the parties but just the opposite; while, on the other hand, the master of *The Mahia* testified that he had never saw the bills of lading before the drums with the dangerous cargo were stowed on deck. See: *The "Mahia"* – Lloyd's List Law Reports [1955] Vol. 1, p. 264 at p. 266.

[175] *The "Mahia"* – Lloyd's List Law Reports [1955] Vol. 1, p. 264 at p. 267-268.

[176] Article IV rule 6 of the Hague Rules/Hague-Visby Rules states: *"Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. […]"*

5.4 The carrier's defences against claims for damaged or lost deck cargo

When a carrier fails to prove that he fulfilled his obligation properly and carefully to load, handle, stow and carry the goods because of unauthorized deck carriage, he is confronted with the issue to what extent he can rely on the exemptions and limitations set forth either in the contract of carriage or in the applicable liability regime. In general, the protection that a carrier may rely on is dependent on the terms in the contract of carriage and also of how these terms are evidenced in the bills of lading. In the case of deck carriage, however, it is difficult to give a straightforward answer whether the carrier would be dismantled of some or all of his defences if goods are carried "illegally" on deck. This is because, as pointed above, the concept of authorized/unauthorized deck cargo varies in the various circumstances.

It is important to note that one of the main accomplishments of the Hague/Hague-Visby Rules is to eliminate clauses that excessively exclude carrier's liability or exonerate the carrier from negligence and, instead, to introduce a fault-based regime with statutory liability exceptions and limitations, which can balance the interests of carriers and shipper. But when deck cargo is involved, it is left to national courts to define whether deck carriage is legal or not. That is why the term authorized deck cargo actually remains ambiguous. As will be seen in *section 6*, depending on the interpretation of the court, the increased risk that stems from stowage on deck may render the agreement to stow on deck not sufficiently well communicated and thus any exemption clauses null and void. Thus, a situation is created where courts in various jurisdictions protect to a different extent owners of cargo carried on deck and there no uniformity could be found at an international level.

Under English law, statutory defences have generally been more warmly welcomed by courts, unlike contractual exceptions and limitations.[177] Furthermore, English courts do not consider unauthorized deck carriage as such a grave breach so as to deprive the carrier from all of the defences available under the Rules. A carrier who breached his obligation to stow below deck can rely to a different degree on a defence clause, depending whether it is a limitation or an exceptions clause. These general observations can be elaborated by examining the court rulings discussed below.

5.4.1 Contractual defences and limitations

Does the breach of the carrier's obligation to carry below deck deprive him from reliance upon limitations or exceptions? This was precisely the issue which stood before the Court of Appeals in the aforementioned case *Encyclopedia Britannica v The Hong Kong Producer*, where the carrier sought to rely on the contractual defences, which he drafted himself.[178] The plaintiff's encyclopedias were carried in containers on the deck of the defendant's steamship *The Hong Kong Producer* from New York to Tokyo, and upon arrival in Tokyo, it was found that the cargo suffered damage by seawater due to the heavy swells during the voyage. As shown *supra*[179], the carrier failed to prove that there

[177] See Hirst J in *The "Chanda"* [1989] 2 Lloyd's Law Reports 494 at p. 505.
[178] *Encyclopedia Britannica, Inc. v The "Honk Kong Producer" and Universal Marine Corporation (The "Hong Kong Producer")* – United States Court of Appeals (Second Circuit) – Lloyd's Law Reports [1969] Vol. 2, p. 536.
[179] See section 3.2.

was an agreement to stow goods on deck. Part of the controversial on-deck clause will be quoted again:

> *13. Stowage On Deck, etc.*
>
> *[…]*
>
> *With respect to goods carried on deck, all risk of loss or damage by peril inherent in or to incidental [sic] such carriage shall be borne by the shipper and* ***the carrier shall have the benefit of all and the same rights, immunities, exemptions, and limitations as provided for in [Art.] 4 of the Hague rules*** *or the corresponding provision of any Act that may be applicable, excepting subdivisions (1), (2) (j), (2) (q), (3) and (4) thereof* [emphasis added].

What the carrier actually sought to achieve by drafting this provision, was actually not only to lessen his obligations and liabilities, but also to contractually afford himself all rights, immunities, exceptions, and limitations under the Article IV of the Hague Rules, excepting himself of the rules which place the burden of proof on the person claiming the benefit of that defence, *i.e.* the carrier.[180] Since stowage on deck in that case was considered an unreasonable deviation, the carrier was deprived of all the benefits of the bill of lading and also of all the immunities set forth in Article IV, including the per package limitation. Therefore, the carrier was held liable for the full amount of the damages, regardless that the package limitation is said in the Rules to apply "in any event".

This judgment concurred with the milestone case *Royal Exchange Shipping v Dixon (1886)*, which has a direct relevance to the issue of the carrier's contractual defences under unauthorized carriage on deck.[181] As mentioned *supra*, a cargo of cotton was shipped on deck of the vessel the *Egyptian Monarch*, which ran aground during the voyage and, in order to get her free, the master properly jettisoned the deck cargo. All bills of lading contained, among others, "jettison" exceptions and the shipowners relied on them, claiming that, under the bills of lading, they were not liable for the jettisoned cargo, and also that the breach of contract in carrying on deck while under-deck carriage was contracted, was not the proximate cause for the damage. The Court disagreed and ruled that the breach of the contract disentitled the shipowners to the jettison exception:

> *[T]his cotton was carried under a contract that it should be stowed under deck. The exception in the bills of lading of "jettison" cannot avail the shipowners, who broke their contract in stowing the cotton upon deck and thereby directly caused the loss to the merchants.*[182]
>
> […]
>
> *[A]t the time when jettison was made of those 125 bales, they were being carried in breach of the contract, and were not within the exceptions specified in the bills of lading, which have exclusive reference to goods safely stowed under hatches. In these circumstances I cannot doubt that the appellants are liable to pay to the respondents the value of the 125 bales, seeing that they cannot*

[180] Article IV rule 1, rule 2(q), and rule 3.
[181] *Royal Exchange Shipping Co Ltd v Dixon* (1886) LR 12 App Cas 11.
[182] *Royal Exchange Shipping Co Ltd v Dixon* (1886) LR 12 App Cas 11, Lord Halsbury, L.C. at p. 16.

> *make delivery in terms of their contract, and have no legal excuse for their failure to deliver.* [183]

The quoted passage should not be, however, perceived as a general rule that the carrier's contractual defences are always void when cargo is wrongfully carried on deck. The particular exemption clause in *Royal Exchange Shipping v Dixon* was referred exclusively to goods carried under deck. Thus, the bills of lading did not prescribe any "jettison" defences for the carrier in the circumstances of the case because the goods were carried above deck. In other words, the cargo was jettisoned in a way which fell outside the exemptions clause. This clause, thus, fits perfectly within the prescription of Mr. Justice Hirst in *The "Chanda"* [1989], which was held nearly one century later, stating that *"clauses which are clearly intended to protect the shipowner provided he honours his contractual obligation to stow goods under deck do not apply if he is in breach of that obligation".* [184] The "jettison" clause in *Royal Exchange Shipping v Dixon (1886)*, on which Hirst, J. relied in his judgment in *The "Chanda"*, was indeed such a clause. Yet, Mr. Justice Hirst did not provide any guidance or yardstick as to which limitation or exceptions clauses embraced in their scope unauthorized carriage on deck (*i.e.* being, thus, applicable) and which did not (*i.e.* being, inapplicable, respectively). Instead, he erroneously assumed that all limitation and exception clauses had, in the circumstances of a wrongful on-deck carriage, a scope as the one mentioned hereinabove. This was one of the reasons why his judgment was later overruled and regarded as wrong. [185]

Similarly, the Court of Appeal in *Evans v Merzario* held that the defendant forwarding agents were not entitled to rely on the exemptions contained in their printed conditions of carriage, which were standard for the forwarding trade. These exemptions contained in the trading conditions gave the forwarders, *inter alia*, the complete freedom in respect of means, route and procedure in the transportation of the goods. However, there was an oral promise given by the forwarders to the cargo interests, which produced a binding obligation to carry the goods below deck, and the forwarders' failure to ensure that its sister company at the port of loading would arrange for under deck carriage was established to be the cause for the loss of the containerized cargo overboard. The Honourable Lords were unanimous that, since the damage resulted from a breach of the forwarders' binding oral promise to carry the goods below deck, none of the exemption clauses in the printed conditions could protect the forwarding agents. [186] To state otherwise would mean that the new contractual term, embodied in the oral promise, would be "illusory" and "stillborn". [187] It is noteworthy that the conclusion that the breach of the oral promise overrode any liability exemptions (including a weight limitation clause of £50 per ton) was reached through interpreting the contract as a whole and not on the basis of the fundamental breach doctrine. [188] Another remark is that none of the

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[183] *Royal Exchange Shipping Co Ltd v Dixon* (1886) LR 12 App Cas 11, Lord Watson at p.19.
[184] *The "Chanda"* [1989] 2 Lloyd's Law Reports 494 at p. 505. *See*: section 3.2 on Fundamental breach *supra.*
[185] *See*: *The "Kapitan Petko Voivoda"* [2003] 2 Lloyd's Law Reports 1 at p. 14, para 21 (Lord Justice Longmore), and at p. 16, para 33 (Lord Justice Judge).
[186] *J. Evans & Sons (Portsmouth) Ltd. v Andrea Merzario Ltd.* – Lloyd's Law Reports [1976] Vol 2, p. 165. See Lord Denning, M.R at p. 168; Lord Justice Roskill at p. 169-170; Lord Justice Geoffrey Lane at p. 170.
[187] *J. Evans & Sons (Portsmouth) Ltd. v Andrea Merzario Ltd.* – Lloyd's Law Reports [1976] Vol 2, p. 165 at p. 170.
[188] *J. Evans & Sons (Portsmouth) Ltd. v Andrea Merzario Ltd.* – Lloyd's Law Reports [1976] Vol 2, p. 165. See Lord Roskill at p.170.

decisions cited above made a distinction between clauses which limited liability, on the one hand, and clauses which exempted from liability, on the other. Such differentiation is observed, however, in the defences available to the carrier under the Hague and Hague-Visby Rules set forth in the next section below.

5.4.2 Defences and limitations under the Hague and Hague-Visby Rules

5.4.2.1 The one-year time bar (Article III rule 6)

The application of the one-year time limit contained in the Hague-Visby Rules was a central issue in *The "Antares"*, where unauthorized deck cargo was damaged during the voyage. On the facts of the case, machinery was shipped at Antwerp for carriage to Mombasa on the owner's vessel *Antares* that was time-chartered by the Mediterranean Shipping Company (MSC) on an NYPE form, which contained a demise clause. Upon discharge, it was discovered that cargo under one of the bills of lading was carried on deck, as a result of which it was seriously damaged. The bill of lading holders at first failed to identify the carrier correctly as they wrongly assumed that the charterers MSC, with whom they contracted for the carriage, were the owners of the vessel. When the plaintiff bill of lading holders finally identified the vessel owners, their claim was time-barred by force of Article III rule 6. In order to defeat the one year time bar, the plaintiffs argued that the carrier had committed a fundamental breach of the contract by carrying the cargo on deck, and, therefore, was not entitled to the defences provided in the Hague-Visby Rules. The Court held that the carrier was not precluded from relying on the one year time bar because Article III rule 6 had general applicability and the provision did not distinguish between fundamental and non-fundamental breaches, nor did it make any distinction between breaches which were equivalent to a deviation and breaches which were not.

Furthermore, Lord Justice Lloyd, giving the leading judgment, underlined that under the provision the carrier shall be discharged from all liability "whatsoever" and "in any event" provided that suit is not brought within one year, and pointed to the fact that the wording of the Hague-Visby Rules' Article III rule 6 is even wider than the old Article III rule 6 in the Hague Rules.[189]

Article III rule 6 (The Hague Rules 1924)	Article III rule 6 (The Hague-Visby Rules)[190]
[…] ***In any event*** *the carrier and the ship shall be discharged from* ***all liability in respect of loss or damage*** *unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered* [emphasis added]. […]	[…] *Subject to paragraph 6bis the carrier and the ship shall* ***in any event*** *be discharged from* ***all liability whatsoever*** *in respect of the goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered* [emphasis added]. […]

In *Scrutton*[191], this amendment, brought by the Visby protocol, is said to have the effect of applying the one-year time bar not only in cases of deviation but also even in

[189] *Kenya Railways v. Antares Co. Pte Ltd. (The "Antares") (Nos. 1 and 2)* – [1987] 1 Lloyd's Law Rep 424 (Court of Appeal), Lord Justice Lloyd at p. 430.
[190] As amended by the Brussels Protocol 1968 and the SDR Protocol 1979.

cases when there was intentional or reckless misconduct on behalf of the carrier within the meaning of Article IV rule 5(e).[192] The bottom line is that the one-year time limit will be valid in extreme circumstances, such as a deviation, a fundamental breach of the contract, or an intentional and reckless misconduct, and there is no reason to assume that courts will not apply it to a case of an unauthorized carriage of goods on deck.

As Lord Justice Judge points out in another case, the one-year time limitation set forth in Article III rule 6 *"does not, in the strictest sense, exclude liability".*[193] It merely sets a contractual period which serves as a time bar for the shipper's right to claim so that after this agreed period has expired, any liability against the carrier and the ship shall be discharged. This is the main reason why courts do not apply such a restrictive reasoning regarding the application of that provision. This is not the case, however, with the carrier's defences set forth in the following two sections.

5.4.2.2 The package limitation (Article IV rule 5)

In cases of unauthorized deck carriage, the application of the package limitation (Article IV rule 5) is considered according to different standards compared to the application of the one-year time bar (Art III rule 6). Whereas the judgment in *The "Antares"* on the validity of the time bar has not been challenged, there are conflicting views in English case law with respect whether a carrier can avail himself of the package limitation defences in the Hague and Hague-Visby Rules. These two defences that are available to the carrier were considered of a different nature with regard to their application to an unauthorized carriage on deck. First, the one-year time bar does not affect the quantum of the limitations, and, secondly, if the package limitation is upheld in circumstances where the carrier has dramatically and wrongfully shifted the risk by stowing the goods on deck, the application of this defence would undermine the purpose of the carrier's obligation to stow below deck.[194]

In *The "Nea Tyhi"*, Sheen J applied the Hague Rules' package limitation provision to a contract of carriage contained in a bill of lading, incorporating the Rules and being claused "shipped under deck", where the carrier nevertheless stowed and carried the goods above deck of the bulk carrier *Nea Tyhi*.[195] As a result, the plywood cargo, which is generally *"very liable to deteriorate if allowed to get damp [and] should never be shipped on deck"*[196], was damaged by rainwater. Accordingly, the defendant's liability was limited under Article IV rule 5 of the Hague Rules from £15,280, what was initially claimed from the plaintiffs, to £14,000, being £100 per package for each of the 140 crates of plywood.

However, the Court in *The "Chanda"* reached quite the opposite decision and considered the package limitation *"repugnant to and inconsistent with the obligation to*

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[191] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – 'Scrutton on Charterparties and Bills of Lading' (20th edition), Sweet & Maxwell (1996), ISBN-10: 0421525800, p. 435.
[192] Article IV rule 5(e) of the Hague-Visby Rules reads as follows: *Neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.*
[193] *The "Kapitan Petko Voivoda"* [2003] 2 Lloyd's Law Reports 1, at p. 15, para 27.
[194] *See*: *The "Chanda"* [1989] 2 Lloyd's Law Report 494 at p. 505 and *The "Pembroke"* [1995] 2 Lloyd's Law Reports 290 at p.295.
[195] *The "Nea Tyhi"* [1982] 1 Lloyd's Law Reports 606.
[196] *The "Nea Tyhi"* [1982] 1 Lloyd's Law Reports 606 at p. 608.

stow below deck", and as such it was held inapplicable.[197] This case was peculiar with the fact that the damage to the goods was found to be a result of a combination of several elements: (1) on-deck stowage, which caused waves hitting the cargo; (2) the positioning of the cargo on deck – it was stowed above hatch No. 1, which was the hatch nearest to the bow, where the "g" forces caused by the movement of the vessel were the greatest; (3) inadequate lashing, which was a contributory cause, as a result of which the cargo started shifting and hitting other cargo. The cargo consisted of a delicate equipment, which should have been below deck and as near as possible to the tipping centre of the vessel, which was under hatch No. 4, in order to prevent as much as possible any movement of the cargo. Instead, the cargo was stowed and positioned in the worst possible way, where it was subjected to maximum exposure to the violent sea and the harsh weather conditions. Hence, Mr. Justice Hirst held the defendant shipowners responsible on two separate grounds: stowing the cargo on deck and positioning it on the forward hatch, and, secondly, inadequate lashing.[198]

Although the judgment in *The "Chanda"* was subsequently criticized[199] and deemed as wrong, it was followed in the New Zealand case *The "Pembroke"*.[200] The High Court of New Zealand endorsed Mr. Justice Hirst's view on package limitation, applied in *The "Chanda"*, that *"clauses which are clearly intended to protect the shipowner provided he honours his contractual obligation to stow goods under deck do not apply if he is in breach of that obligation [and] the package limitation clause falls fairly and squarely within this category"*.[201] Although the Court in *The "Pembroke"* struck the application of the package limitation, it did not provide any independent reasoning but relied entirely on the disputed *The "Chanda"*.

The definitive verdict on the application of the package limitation under an unauthorized deck carriage was given in *The "Kapitan Petko Voivoda"*[202], which represents the current law. The owners and the charterers of the Bulgarian vessel *Kapitan Petko Voivoda* were sued for the partial damage and loss of cargo, which was wrongfully stowed on deck. The cargo owners contracted for the carriage of 34 excavators from Korea to Turkey. The contract of carriage was evidenced by six CONLINE bills of

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[197] *The "Chanda"* [1989] 2 Lloyd's Law Reports 494 at p. 505.
[198] *The "Chanda"* [1989] 2 Lloyd's Law Reports 494 at p. 501.
[199] The main points of criticism were that: 1) by applying the "repugnancy" principle to Article IV rule 5, which was anyway inappropriate as a matter of construction because of the words "in any event", Hirst J. failed to follow the well-established approach that "*if two or more provisions of a contract are inconsistent or "repugnant" the court will nonetheless seek to make sense of them in the light of the commercial context and the deduced intentions of the parties"* (*The "Kapitan Petko Voivoda"* [2002] EWHC 1306 (Comm), Langley J at para 23-24); 2) nothing in the reasoning of Hirst J. addressed the wording of Article IV rule 5, and in particular the words "in any event" (*ibid.*); 3) the reasoning in *The "Chanda"* did not take into account the judgment in *"The Happy Ranger"* [2002] (C.A.) 2 Lloyd's Rep. 357, where the package limitation provision was applied to a breach of the seaworthiness obligation (*ibid.*, para 25); 4) Hirst J. made too broad a proposition that the limitation clause can hardly have been intended to provide a protection to a party, who committed such a serious breach by exposing the cargo to "such palpable risk of damage"; just the contrary, exemption and limitation clauses arise precisely when there is a breach (*The "Kapitan Petko Voivoda"* [2003] EWCA Civ 451; [2003] 2 Lloyd's Law Reports 1, Judge L.J. at p. 17, para 41-42).
[200] *Nelson Pine Industries Ltd. v Seatrans New Zealand Ltd. (The "Pembroke")* – [1995] 2 Lloyd's Law Reports 290.
[201] *The "Chanda"* [1989] 2 Lloyd's Law Reports 494 at p. 505.
[202] *Daewoo Heavy Industries Ltd and Another v Klipriver Shipping Ltd and Another (The "Kapitan Petko Voivoda")* – [2002] EWHC 1306 (Commercial Court) (Langley, J.); [2003] EWCA Civ 451 (Aldous, L.J., Judge, L.J., Longmore, L.J.) (Court of Appeal) – [2003] 2 Lloyd's Law Reports 1.

lading, which contained a General Paramount Clause, incorporating the Hague Rules as enacted in Turkey, and none of the bills stated that the excavators would be stowed on deck. The contract was also partly evidenced by a fax, which provided that the carriage would be only under deck. The carrier stowed and lashed the goods accordingly and proceeded with the contractual journey but, when the vessel called at Xingang, China to load additional cargo, 26 of the excavators were discharged and then restowed on deck. On her way to Turkey, the vessel encountered heavy weather, which resulted in the loss of eight excavators, which broke free of their lashes and fell overboard, and also in some minor damage from wetting and rusting to several other excavators that were stowed on deck.

The ruling in *The "Kapitan Petko Voivoda"* provides several solid arguments why the package limitation should prevail over a breach of the obligation to stow under deck**.**

Firstly, Langley J. pointed out in the preliminary trial in the Commercial Court that a view was expressed in *Carver on Bills of Lading*[203] that the Hague-Visby Rules contained their own "fundamental breach" provision, Article IV rule 5(e), which operated as an exception to the application of the limitation of liability, and, therefore, there was no justification in disapplying the package limitation provision in case of a wrongful deck carriage, because the Rules already had this defensive mechanism.[204] Regardless that the Hague Rules, and not the Hague-Visby Rules, were applicable to the present case, that was a valid point as to the intention of the drafters of the Convention.

Secondly, the words "in any event" in Article IV rule 5 should be construed in their most natural meaning, which is "in every case", regardless how serious a breach is involved in the case.[205] A reference was made to the reasoning of Tuckey L.J. in *The "Happy Ranger"* that the words "in any event" are unlimited in scope, leaving little room for doubt whether they will apply to a case of a wrongful stowage on deck:

> *However, I think that the words "in any event" mean what they say. They are unlimited in scope and I can see no reason for giving them anything other than their natural meaning. A limitation of liability is different in character from an exception. The words "in any event" do not appear in any of the other art. IV exemptions including r.6 and as a matter of construction I do not think they were intended to refer only to those events which give rise to the art. IV exemptions.* [206]

Thirdly, the package limitation provision was held to apply in *The "Happy Ranger"*,[207] where the carrier could limit his liability under Article IV rule 5, even though he breached his seaworthiness obligation under Article III rule 1, which is considered "overriding".[208] Even though the obligation to carry under deck is *"an*

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[203] Sir Guenter H. Treitel Q.C., Francis M.B. Reynolds Q.C. – *'Carver on Bills of Lading'* (First Edition) (2001), Sweet & Maxwell, ISBN-13: 978-0421564701, at p. 525.
[204] *Daewoo Heavy Industries Ltd and Another v Klipriver Shipping Ltd and Another (The "Kapitan Petko Voivoda")* – [2002] EWHC 1306 (Commercial Court) (Langley, J.), para 13.
[205] *Daewoo Heavy Industries Ltd and Another v Klipriver Shipping Ltd and Another (The "Kapitan Petko Voivoda")* – [2003] EWCA Civ 451 (Court of Appeal) (Aldous, L.J., Judge, L.J., Longmore, L.J.) – [2003] 2 Lloyd's Law Reports 1, at p. 13, para 16.
[206] *The "Happy Ranger"* [2002] 2 Lloyd's Reports 357 at p. 364, para 38.
[207] *The "Happy Ranger"* [2002] 2 Lloyd's Reports 357.
[208] For the term overriding obligation, see *Chapter II*, section 4.1.1.

extremely important obligation", it cannot be said to be "overriding".[209] Therefore, if deductive reasoning is applied to the foregoing two propositions, it can be safely concluded the limitation of liability provision will apply to a breach of the obligation to carry on deck as well.

Eventually, *The "Chanda"* was overruled and the decision in *The "Nea Tyhi"* was approved, meaning that a carrier can limit his liability if he breaches his obligation to carry the goods under deck.

5.4.2.3 The exceptions from liability in Article IV rule 2

Unlike the package limitation clause in Article IV rule 5, the provisions in Article IV rule 2 represent a true exemption clause, and, although not impossible, it is unlikely that a carrier who breached his obligation to stow below deck, will be able to use the protection of the defences listed in that latter article.[210] The defendants in *"The Kapitan Petko Voivoda"* tried to rely, among others, on the peril of the sea (Article IV rule 2(c)) and the insufficiency of packing (Article IV rule 2(n)) defence but to no avail. The Court held that, if the cause for damage or loss is the carriage on deck and that would not have happened had the goods been carried below deck, a party cannot exclude his liability by resorting to Article IV rule 2. This is so because these defences should be interpreted to apply only to carriage below deck.[211] Thus, for example, the scope of Article IV rule 2 (c) covers perils of the sea which could cause damage or loss to cargo stowed below deck, and the defence does not stretch to the highly-risky carriage on deck. Similarly, the defence in Article IV rule 5(n) covers packing which should be sufficient for under-deck carriage, and it does not require packing to endure the carriage on deck.

The "repugnancy" or "inconsistency" principle, employed by Hirst J. in *The "Chanda"*, although inappropriately used to reject the package limitation, is applicable to the liability exceptions in Article IV rule 2.[212] Accordingly, these exceptions provisions are *"repugnant to and inconsistent with the obligation to stow below deck"*.[213]

5.5 Deck carriage under charter parties

As already noted on a numerous occasions,[214] when the carriage is effected under a charterparty, the Hague or Hague-Visby Rules become facultative and their application depends on the intention of the parties, which is expressed by the presence or absence of a Clause Paramount in the charter party. In that sense, the contracting parties may exclude the operation of the Rules from their contract by agreeing to base their commercial relations on a charterparty, while not inserting a Clause Paramount in the charter.[215]

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[209] *Daewoo Heavy Industries Ltd and Another v Klipriver Shipping Ltd and Another (The "Kapitan Petko Voivoda")* – [2003] EWCA Civ 451 (Court of Appeal) (Aldous, L.J., Judge, L.J., Longmore, L.J.) – [2003] 2 Lloyd's Law Reports 1, at p. 13, para 18.

[210] *See*: *The "Kapitan Petko Voivoda"* [2002] EWHC 1306 (Comm), Langley J. at para 27; *The "Kapitan Petko Voivoda"* [2003] EWCA Civ 451, [2003] 2 Lloyd's Law Reports 1, Longmore L.J. at p. 15, para 27.

[211] *The "Kapitan Petko Voivoda"* [2002] EWHC 1306 (Comm), Langley J. at para 27.

[212] *The "Kapitan Petko Voivoda"* [2002] EWHC 1306 (Comm), Langley J. at para 27. (*ibid.*)

[213] *The "Chanda"* [1989] 2 Lloyd's Law Reports 494 at p. 505.

[214] See: *Chapter I*, section 2.2.2 (*Essence of the charterparty agreement*); *Chapter II*, section 4.4 (*Carrier's cargo-related duties under charter parties*); and *Chapter III*, section 4.7 (*FIOS(T) clauses in charterparty agreements*).

[215] *'Carver on Bills of Lading'* (2nd edition), Sweet & Maxwell Ltd (2005), London, p. 478, para 8–071.

However, when a charter party incorporates the Hague/Hague-Visby Rules and encompasses deck cargo as well, what is the effect of Article I(c) of the Rules on this particular deck carriage? Could the "contract of carriage", as stated in the Rules, refer to the charter party, and not only to the bills of lading? And if so, should there be a notation on the charter party in order to exclude the deck cargo from the ambit of the Rules as required by Article I(c)? The answer to both questions is no. Article I(c) does not apply to the carriage of deck cargo as between the shipowners and the charterers, and the "contract of carriage" is the relevant bill of lading.[216] It was held in *The "Socol 3"* that it would be difficult to apply the definition set forth in that article to a charter party, which is generally not concluded between parties in connection with loading of the cargo, because its subject is the vessel rather than the cargo.[217] A time charter, for example, can be concluded even before it is clear what cargo will be carried on deck and it cannot possibly contain an on-deck statement. Therefore, only a bill of lading, and not a charter party, can contain the on-deck statement or notation, to which Article I(c) refers. As pointed out by the authors of *'Voyage Charters'*, the process of incorporation of the Rules into a charter party should be *"carried out intelligently in relation to the context and not mechanically".*[218]

On the other hand, when the Hague/Hague-Visby Rules are not incorporated in a charter party, there will be no definition of "goods" and, therefore, any deck cargo will not be singled out as a specific type of carriage to which specific deck-cargo rules apply (as opposed to the general rules regulating the carriage of below-deck cargo). Subjecting below-deck cargo and on-deck cargo to the same rules is possible, of course, only if special rules, regulating deck cargo, are not expressly specified in the provisions of the charterparty. That is why, most charter parties contain a specific provision, or several provisions, related to deck carriage. These charterparty clauses, usually, describe and distribute the obligations of the parties with respect to the cargo carried on deck as well as the pertaining liabilities, should these obligations are not dully discharged by the relevant party. Accordingly, the carriage of deck cargo under charter parties have led to numerous disputes and prompted many decisions on the proper construction of various deck cargo clauses which attempt to shift the responsibility and the risk over cargo carried on deck.

5.5.1 Voyage charter parties

Under voyage charters, the responsibility for stowing deck cargo can be transferred to any party, depending on, as it is with all charter parties, what the shipowners and charterers have agreed on. For example, the Gencon charter, the most popular and most widely used voyage charter party in all kinds of trades and cargoes, provides that in case the shipment of deck cargo has been agreed between the parties, such carriage shall be at the charterer's risk and responsibility.[219] The words *"and responsibility"* emphasize the position that should deck cargo be lost or damaged, the liability stays with the charterers. Yet, the charter party does not contain a liberty to

[216] *Onego Shipping & Chartering BV v JSC Arcadia Shipping (The "Socol 3")* – [2010] 2 Lloyd's Law Reports 221.
[217] See *Chapter I*, section 2.2 on charter parties.
[218] Julian Cooke, Timothy Young QC, John Kimball, LeRoy Lambert, Andrew Taylor, David Martowski – *'Voyage Charters'* (4th Edition, 2014), para 8.12.
[219] "Gencon" Charter (As Revised 1922, 1976, and 1994), Part II, lines 10-11.

stow on deck, let alone an obligation to do so. It merely distributes the responsibility over the deck cargo if the parties agree on such carriage and insert a special provision to that effect. It is important to note in that regard that an agreement between the shipowners and the charterers to carry goods on deck cannot be a defence in an action by a third-party bill of lading holder if that agreement is not incorporated in the bill.

5.5.2 Time charter parties

Under time charters, the liability issues that arise are more often related to FIOST clauses, *i.e.* clauses stipulating which party is to be held responsible for loading and stowing (clause 8 of NYPE), and not so much to deck cargo clauses. This is because deck stowage does not differ from below-deck stowage with respect to the question of who is the responsible for performing the operation. As discussed at great length in *Chapter III*, it is very often that time charter parties contain a clause which transfers the risk and the responsibilities over deck cargo from the shipowners to the charterers, and when the charterer's obligation to *"load, stow, and trim the cargo"* has been subjected to *"the supervision of the master"*, the responsibility over the cargo does not revert back to the shipowners unless the words *"…and responsibility"* have been added. The interpretation of such a FIOST clause as well as its interaction with a deck cargo clause, laid down in the charter party, may appear problematic in certain instances, especially if the deck cargo clause puts the responsibility on another party contrary to what the FIOST clause states. In general, the two main issues that come before courts are whether or not the cause for the loss or damage of the deck cargo is poor stowage and lashing, or whether it is the unseaworthiness of the vessel.

5.5.2.1 "at charterers' risk"

In general, such a clause, stating that deck cargo will be carried "at charterer' risk", will effectively transfer the responsibility over such cargo from the shipowners to the charterers.[220] However, when deck cargo is said to be carried *'at charterers' risk'*, disputes often arise as to the precise scope of these words. In *The "Fantasy"*, for example, such a clause, inserted in a NYPE time charter form, provided also for additional duties for the carrier:

> *63.Deck Cargo: Charterers entitled to load deck cargo provided regulations permit. Deck cargo, if any, to be checked and protected by crew up to twice a day during sea passages, if required by charterers and/or circumstances deemed it appropriate. Same to be tightened up or replaced or additional lashing to be added appropriate to circumstances; such cargo to be carried at charterers' risk.* [221]

The vessel *The Fantasy* was time chartered for the carriage of containerized cargo as all cargo was loaded and carried on deck. Because of adverse weather conditions, one container was washed overboard and 14 others were damaged, while the vessel herself was also damaged. The Court had to establish which party was responsible for the damage caused to and by the deck cargo, where the plaintiffs and the defendants agreed on the assumptions that the damage was a result of the negligent stowage and lashing,

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[220] Terence Coghlin, Andrew W. Baker, Julian Kenny, John D. Kimball – *'Time Charters'* (6th edition), Informa, London (2008), p.362, para 20.31.

[221] *Exercise Shipping Co Ltd v Bay Maritime Lines Ltd (The "Fantasy")* – [1991] 2 Lloyd's Law Reports 391; [1992] 1 Lloyd's Law Reports 235.

on the one hand, and/or of the default on behalf of the crew during the voyage, on the other hand.

Whereas the extra obligation for the shipowners in clause 63 relates to the period during the voyage and is applicable only to deck cargo, the charterparty contained also other obligations which related to the loading, stowage, and discharge of any cargo:

> *8. That the Captain shall . . . render all customary assistance with ship's crew and boats. The Captain (although appointed by the owners), shall be under the orders and directions of the Charterers as regards employment and agency; and Charterers are to load, stow and trim and discharge the cargo at their expense under the supervision of the Captain. . .*
>
> *42. Loading, Stowing and Discharging: The Master to supervise and be responsible for all loading, stowage and discharging operations.*
>
> *50. Loading, Stowing, Etc. In the event Charterers have representatives at load and/or discharge ports to advise Charterers' requirements loading/stowing and or discharging, ship's command to follow same regarding cargo operations as far as reasonably practicable subject to such requirements not impairing safety/stability of vessel and cargo or not risking damage to same; Master nevertheless to supervise and in all circumstances be responsible for loading, stowing, lashing and discharging in accordance with Clauses 8 and 42. . .*

With regard to clauses 8, 42, and 50 alone, it was already established in *Chapter III* on FIOS(T)[222] that the references to the master's "responsibility" render the shipowners responsible for loading, stowage, and discharge, regardless that it is actually the charterers who employ and pay the stevedores for carrying out these operations. However, the Court was confronted with the argument that clause 63 on deck cargo, which was the only defence that the shipowners relied on, may qualify the obligations in clauses 8, 42, and 52, and negative the original transfer of responsibilities from charterers to shipowners with regard to cargo carried on deck.[223] In other words, what is the scope of the words "at charterer's risk", and do they also cover negligence with respect to deck carriage?

The first Court held that the words "at charterer's risk" are not sufficient to provide protection to the shipowners and exempt them from liability for negligence in performing the crew's additional duties under clause 63 regarding the deck cargo.[224] However, it does not follow from this that the shipowners are liable also for negligence in carrying out the loading and stowing obligations that are set in clauses 8, 42, and 50. Here, the owner's responsibility for loading and stowage collides with the charterer's acceptance of the risk over deck cargo. After interpreting the inferred intention of the parties,[225] Evans, L.J. held that the responsibility stayed with the charterers under

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[222] See *Chapter III*, section 4.4 (*FIOS(T) clauses in charterparty agreements*).
[223] *The "Fantasy"* [1991] 2 Lloyd's Law Reports 391, at p.394.
[224] *The "Fantasy"* [1991] 2 Lloyd's Law Reports 391, at p.395.
[225] *The "Fantasy"* [1991] 2 Lloyd's Law Reports 391, at p.396: *"Charterers sought the liberty to load deck cargo in the form of containers which would be carried on the hatch covers. Owners would not normally accept liability for such cargo (witness the definition of "cargo" in the Hague Rules) but they were prepared to*

clause 8, while the transfer of responsibility from the charterers to the shipowners under clauses 42 and 50, was negatived with respect to deck cargo because of the wording in clause 63 (*"…[deck] cargo to be carried at charterers' risk"*).[226] The transfer of responsibility under clauses 42 and 50 was, thus, limited only to cargo which was carried below deck. Consequently, the charterers remained liable for negligent stowage, whereas the shipowners were held liable for the crew's negligence in fulfilling the additional obligations required for deck cargo and set forth in clause 63 (as stated already, the very same clause could not absolve the shipowners from liability for negligence). In conclusion, it is worth mentioning that, although the words "at charterers' risk" were not held to be sufficient to exempt from liability for negligence, Evans, L.J. pointed out that the scope of these words depended on the context in which they were found, and also that they might, nevertheless, relieve a shipowner from liability in case of a damage caused by third parties who were entrusted with the performance of the relevant operations.[227]

With regard to deck cargo clauses (*e.g.* "at charterers' risk"), which provide also for additional duties for the shipowners, such as the clause seen above in *The "Fantasy"*, namely that the owners have to check and protect the cargo during the voyage, or such as the deck cargo clause found in *The "Visurgis"*,[228] which was coupled with the shipowners' obligation to perform the lashing of the cargo, it was held that the protection afforded by the deck cargo clause ceases to shield the shipowners if it was established that the loss of or damage to the cargo resulted from the negligence of the crew to perform those the obligations.[229]

Later decisions provided a better shelter for carriers who were carrying deck cargo and who heavily relied on on-deck exclusion clauses. The Court in *The "Danah"* extended the protection afforded to carriers by a deck cargo clause, and held that *"carried on deck at Shipper's risk with responsibility for loss or damage howsoever caused"* covered also negligence.[230] Thus, the additional words "howsoever caused" ensure that negligence is also covered by a deck cargo clause. In this particular case, the clause was inserted in an addendum to extend the operation of a NYPE time charterparty. Again, the charter party provided in clause 8 that the *"Charterers are to land* [sic]*, discharge, stow, and trim the cargo at their expense under the supervision and responsibility of the Captain"*. The Court rejected an argument of the charterers that the deck cargo clause was a mere direction as to what should be inserted in the bills of lading rather than a provision, which deals with the distribution of rights and

undertake that the crew would attend to it during the voyage. On that basis , charterers could load the cargo at their own risk, subject to negligence of the master in supervising its loading and stowage, for which owners would be liable without any transfer of responsibility under cll. 8, 42 and 50. The two parts of cl. 63 therefore represent an easily understood compromise; in return for the owner's undertaking that the crew would check and protect deck cargo during the voyage, such cargo was to be carried at charterers' risk, meaning that owners did not otherwise accept responsibility for it".

[226] *The "Fantasy"* [1991] 2 Lloyd's Law Reports 391, at p.396 (*ibid.*).

[227] *The "Fantasy"* [1991] 2 Lloyd's Law Reports 391, at p. 395.

[228] *The "Visurgis"* [1999] 1 Lloyd's Law Reports 218.

[229] Simon Baughen – *'Shipping Law'* (4th edition), Routledge-Cavendish (2009), p. 213-214.

[230] *Kuwait Maritime Transport Co v Rickmers Linie K.G. (The "Danah")* – [1993] 1 Lloyd's Law Reports 351 at p. 354: *"In this regard it seems to me to be clear that the clause is apt to exclude loss of or damage to deck cargo caused by want of care on the part of the owners in and about the carriage of such cargo".*

obligations between the shipowners and the charterers.[231] The deck cargo clause was designed precisely to regulate the rights and obligations of the parties under the charter, and, considering the commercial purpose of a charterparty, it is incumbent upon the charterers to ensure that the distribution of these rights and obligations, as stated in the deck cargo clause, will be preserved in the bills of lading which the charterers sign with any third-party shippers.[232] An important remark is that the word "responsibility" in the deck cargo clause was held to refer only to damage to or loss of the goods, and it did not encompass a claim by the coastal authorities for the salvaging of hazardous cargo lost overboard.[233]

What is more, a deck cargo exclusion clause may protect the shipowner from liability not only for negligence, but also even for unseaworthiness. In *The Imvros*,[234] Langley, J., affirmed the reasoning in *The "Danah"* and extended it to the effect that the words *"whatsoever and howsoever caused"* in a deck cargo provision in a NYPE time charter party transferred the liability for damaged or lost deck cargo to the charterers, even when that cargo rendered the vessel unseaworthy. [235] Thus, the protection of those words, relied not only to negligence but also to unseaworthiness.[236] The relevant charter party provision read:

> *Additional Clause 91*
> ***Deck Cargo***
> *Charterers are permitted to load cargo on the vessel's deck and hatch covers* ***provided always that*** *the permissible loads on the deck/hatch covers are not exceeded, that the stability of the vessel permits, and that* ***such cargo does not impair the seaworthiness or safe navigability of the vessel in any manner****. Any extra fittings required for deck or hatch cover cargo are to be provided and paid for by the Charterers who are to load, stow, dunnage, lash and secure such cargo in their time and at their expense always to the entire satisfaction of the Master. The vessel is not to be held responsible for any loss of or damage to the cargo carried on deck* ***whatsoever and howsoever caused****.* [emphasis added]

The effective cause for the cargo being lost overboard was established to be insufficiency of lashing, which had been performed in contravention of the IMO Code of Practice for Ships Carrying Timber Deck Cargoes, and which rendered the vessel unseaworthy. In the present case, the cargo-related obligations were divided between the charterers and the shipowners. Like in *The "Visurgis"*, the charterers in *The "Imvros"* were responsible for loading and stowing (*clause 8*), while the vessel's crew was responsible for lashing (*additional clause 48*). However, under the latter charterparty provision, in fulfilling their lashing obligations, the crew was considered charterers'

[231] *The "Danah"* [1993] 1 Lloyd's Law Reports 351, at p. 353-354.
[232] *The "Danah"* [1993] 1 Lloyd's Law Reports 351, at p. 354.
[233] *The "Danah"* [1993] 1 Lloyd's Law Reports 351, at p. 354 (*ibid.*).
[234] *The "Imvros"* [1999] 1 Lloyd's Law Reports 848.
[235] However, it should be mentioned that Langley, J., took into account the fact that the due diligence obligation under COGSA was expressly deleted in the amended NYPE time charter party. Also, there were express absolute obligations of seaworthiness, although limited, in lines 21-22 and clause 1 of the NYPE charter, and these were not breached by the shipowners. See: *The "The Imvros"* [1999] 1 Lloyd's Law Report 848, at p. 851.
[236] *The "Imvros"* [1999] 1 Lloyd's Law Reports 848 at p. 852-853.

servants. Thus, there was nothing to qualify the deck cargo clause, and the latter shifted the entire responsibility for the loss of the cargo over the charterers.

Regardless of the decision in *The "Imvros"*, however, shipowners are advised to carefully draft their deck cargo clauses, and not solely to rely on the words "whatsoever and howsoever caused", but to explicitly exclude liability for negligence and seaworthiness, because the law on construction of such deck-cargo clauses is far from settled and it is not unlikely that a future Court of Appeal might take a more restrictive approach towards them.[237] For instance, in the Canadian case *The "Beltimer"*, the Federal Court of Appeal held that the lack of an express reference to negligence in the liberty clause to stow goods on deck was the reason why this clause failed to exclude the carrier's liability for negligence as well as for breaching the implied warranty of seaworthiness.[238]

Similarly, the Court in *The "Socol 3"*, a case with a similar straightforward factual background, held that a deck-cargo exclusion clause in a NYPE time charter could not protect the shipowners from liability for their negligence or for the vessel's unseaworthiness.[239] It was established preliminarily by the arbitration tribunal that there were three causes for the loss of the deck cargo, and these were: (a) inadequate stowage of the cargo; (b) insufficient lashing and negligent care of the lashing during the voyage, and (c) the vessel's instability due to the stowage of the deck cargo, which was known only to the shipowners.[240] The language of the respective deck cargo clause was found by the Court to lack an express reference to negligence or seaworthiness:

> *Clause 13*
> *[…]*
> *(b) In the event of deck cargo being carried, the Owners are to be and are hereby indemnified by the Charterers for any loss and/or damage and/or liability of* ***whatsoever*** *nature caused to the Vessel as a result of the carriage of deck cargo and which would not have arisen had deck cargo not been loaded.* [emphasis added]

The Court outlined three factors for interpreting the exclusion clause as one not covering negligence and unseaworthiness: the language of the clause; the context, in which it was situated; and the fact that its content was realistic and meaningful if it did not cover negligence and unseaworthiness. Therefore, regardless of the words *"and/or liability of whatsoever nature"*, the clause was held not wide enough to cover a breach of

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[237] Simon Baughen – *'The Perils of Deck Cargo (The Imvros)'*, Lloyd's Maritime and Commercial Law Quarterly (2000), p. 295, at p.299.

[238] See: *Canadian Pacific Forest Products Ltd-Thasis Pacific Region v The Beltimber (The "Beltimber")*, [1999] 4 FC 320, at para [6] to [8].

[239] *Onego Shipping & Chartering BV v JSC Arcadia Shipping (The "Socol 3")* – [2010] 2 Lloyd's Law Reports 221.

[240] With regard to the latter cause, the shipowners were held responsible for the cargo operations, regardless of the FIOST clause which, in general, is to transfer the cargo-related obligations to the charterers. This is because the factual matrix in *The "Socol 3"* allowed the charterers to invoke and rely on the second exception to the transfer of a cargo-related duties via a FIOST clause as established in *Court Line Ltd. v Canadian Transport Co Ltd* [1940] 1 Lloyd's Law Reports 161, namely: responsibility stays with the shipowners if the damage or loss to the cargo are attributed to the want of due care in matters related to the vessel, for which the master had, or should have had knowledge, but the charterers did not. Therefore, the principal issue in *The "Socol 3"* turned to be whether the wording of the deck cargo clause was wide enough to cover the shipowners' liability and to provide them a defence against negligence and unseaworthiness. For the FIOST clause, see: *Chapter III*, section 4.7 (*FIOS(T) clauses in charterparty agreements*).

the seaworthiness obligation or negligence on behalf of the crew, but it only covered liability for damage to, or loss of the goods, which was directly caused by the carriage of the deck cargo. This was, thus, considered an exclusion clause which, if it was purported to effectively exclude negligence and unseaworthiness, must have had an unambiguous wording and clear intent to that effect. Bottom line, the deck-cargo exclusion clause did not cover negligence and unseaworthiness and, thus, this decision questioned whether *The "Imvros"* can still be considered good law.

5.5.2.2 "at charterers' own risk and expense"

The case *The "Darya Tara"*[241] is another example of a clause, which transfers the responsibility over deck cargo from the shipowners to the charterers, where the Court was asked to consider the scope and the effect of the words "risk and expense". This case concerned the issue of who should bear the financial consequences that have arisen from the shifting of a deck cargo. In particular, the vessel *Darya Tara* was time chartered on an amended NYPE form for a trip from Middlesbrough to Hong Kong and other ports in the Far East. The stowage of the cargo was adequate but, due to severe weather conditions during the voyage, the vessel had to seek port of refuge where the shifting deck cargo was restowed and secured. Thereby, additional costs were accrued, comprising additional expenses for relashing the cargo, extra bunkers, the vessel being off hire, and surveyors appointed by the shipowner's P&I club. The charter party provisions, which were related to deck cargo, stated as follows:

> *Line 25: Charterers to have the option to load a full deck cargo . . . at their own risk and expense subject to the Master's approval.*
>
> *Clause 57. Vessel's Description*
>
> *[…]*
>
> *(3) Charterers' option deck cargo: OK—but vessel has no lashing materials on board and cargo to be loaded always at Charterers' risk and expense. Furthermore all bills of lading to be claused accordingly.*

Whereas the owners contended that these provisions created a complete indemnity with regard to the deck cargo against any loss, the charterers argued that the words "risk and expense" had a more narrow scope and comprised the risk related only to the deck cargo and the expenses associated with loading at the load port. Mance J. held that the words "risk and expense" were not limited only to the period of loading at the original port of loading but they extended also to the entire carriage, including any restowing and relashing at an intermediate port or a port of refuge.[242] However, it was the deck cargo that was "at charterers' risk and expense", meaning that the words referred to the risk and expense that is related to the deck cargo particularly, and not to any risk and expense in general. The word "risk" is focused *"on responsibility for the safety and condition of the cargo loaded on deck"*, while "expense" focuses *"on expenditure involved in the loading and […] (although not specifically mentioned) carriage of such cargo on deck"*. [243] Thus, damages were recoverable in so far as they are related to the deck cargo, and, therefore, recovery was allowed of the fees for deck-cargo survey and

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[241] *L.D. Seals N.V. v Mitsui Osk Lines Ltd (The "Darya Tara")* – Queen's Bench Division (Commercial Court) (Mr. Justice Mance) – [1997] 1 Lloyd's Law Reports 42.
[242] *The "Darya Tara"* [1997] 1 Lloyd's Law Reports 42, at p. 49.
[243] *The "Darya Tara"* [1997] 1 Lloyd's Law Reports 42, at p. 49 (*ibid.*).

restowage but not of repairs to the ship, bunkers, or lost hire, which were brought about as a result of the ship's deviation to the port of refuge.

In conclusion, where the deck cargo is stated in the charter party as *"at Charterers' risk and expense"*, the responsibility of such cargo indeed shifts to the charterers, but the shipowners are not indemnified for *any* consequences whatsoever that may result from the carriage of goods on deck. However, authors assume that Clause 13(b) of the revised form of NYPE 1993 – *"In the event of deck cargo being carried, the Owners are to be and are hereby indemnified by the Charterers for any loss and/or damage and/or liability of whatsoever nature caused to the Vessel as a result of the carriage of deck cargo and which would not have arisen had deck cargo not been loaded"* – which provides wide considerably wider indemnity for the shipowners, might cover even the expenses of the shipowner which were not recoverable in *The "Darya Tara"*, such as bunkers and loss of hire, but this assumption is still unclear and cannot yet be argued with certainty.[244] Some authors are even sceptical as to its effectiveness to cover all liability *whatsoever*.[245]

6. Selected problems of deck carriage in other jurisdictions

6.1 France

The French law on deck cargo has been criticized by French scholars and practitioners for being persistently confusing, and the French jurisprudence adds up even more perplexity to the regulation of this type of carriage.[246] In essence, carriage of goods on deck in France is subject to two distinct regimes – the first one is governed by domestic law (*droit interne*), and the second one by international law (*droit international*).[247]

6.1.1 *Droit interne*

Under the first regime, the carrier is allowed to transport goods on deck only when the shipper has granted his consent to such carriage. When the shipper has consented to deck carriage, clauses related to damages and carrier's liability are held valid by the court. Alternatively, absent such an acceptance on behalf of the shipper, the carriage on deck is considered irregular (*fautif*), and the carrier is then held liable and he can no longer invoke any clauses that exonerate him or limit his liability. Thus, the first regime governing deck carriage in France distinguishes between regular (*non fautif*) and irregular (*fautif*) deck carriage.

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[244] Stephen Limbert – *'Deck Cargo—Financial Responsibility for Shifting (The Darya Tara)'*, The International Journal of Shipping Law, 1997, Vol. 2, p. 81, at p. 83.

[245] Terence Coghlin, Andrew W. Baker, Julian Kenny, John D. Kimball – *'Time Charters'* (6th edition), Informa, London (2008), p. 363, para 20.33.

[246] See: Yves Tassel – *'Le régime juridique de la « pontée » : un arrêt d'espèce malheureux'*, [Juin 2008] DMF 693, p. 538; Cécile De Cet Bertin – *'Obligations du transporteur en pontée'*, [Octobre 2010] DMF 718, p. 796; Jérôme de Sentenac – *'Pontée irrégulière, pontée fautive'*, DMF 737 [Juin 2012], p. 534; Olivier Raison – *'Régimes applicables au transport en pontée : les confusions persistent (v. la note)'*, [Novembre 2013] DMF 752, p. 899.

[247] Olivier Raison – *'Régimes applicables au transport en pontée : les confusions persistent (v. la note)'*, [Novembre 2013] DMF 752, p. 899, at p. 901.

Two questions arise out of this requirement to seek the shipper's consent: who is to establish the acceptance of the shipper, and how should this acceptance be established? With regard to the first issue, it is obvious that the burden of proof will rest on the carrier to establish that the shipper has consented to on-deck carriage. The second issue is, however, more difficult to settle. French law does not require a special acceptance on behalf of the shipper, and the shipper's signature on a bill of lading, comprising an on-deck clause, is sufficient to establish an agreement for such carriage.[248] However, very often the bill of lading will not be signed by the shipper, because French law does not require anymore that the shipper signs the bills of lading.[249] In the particular case of carrying containerized cargo under French law, a carrier is facilitated by an express provision, according to which the shipper's consent to deck carriage is deemed to have been given if two cumulative requirements are fulfilled: (1) the cargo must be stowed in containers, and (2) the vessel must be specifically equipped for such type of transport.[250] Yet, this presumption does not apply to loading open-top containers on deck, and, according to French jurisprudence, such carriage is not only irregular but also inexcusable, meaning that the carrier is deprived of the possibility to rely on any exceptions or limitations.[251] Thus, the increase in the risk is considered so great when open-top containers are carried on deck, that French courts disregard in their assessment the other factors discussed previously, namely the level of knowledge of the cargo owners about such carriage and also how clearly any exemptions have been communicated to the latter. Under French national law, the carriage of open-top containers on deck is clearly considered a fundamental breach of the contract.

6.1.2 *Droit international*

The second regime, regulating deck cargo, relates to the applicable international law. The Brussels Convention of 1924, as amended, (The Hague/Hague-Visby Rules) is ratified and adopted by France and, as regards deck cargo, the interpretation of Article I(c) is *prima facie* similar to that, which we already observed under English law. "Cargo", within the meaning of the Convention, includes all goods except live animals and cargo, which by the contract of carriage, is declared as carried on deck, and is in fact so transported [*"la cargaison qui, par le contrat de transport, est déclarée comme mise sur le pont et, en fait, est ainsi transportée"*]. French authors underline that the definition in Article I(c) merely denotes the scope of application of the Convention and, therefore, when considering deck cargo cases under the Convention, it is no longer correct to divide

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[248] Yves Tassel – *'Le régime juridique de la « pontée » : un arrêt d'espèce malheureux'*, [Juin 2008] DMF 693, p. 538, at p. 540.

[249] Décret n°87-922 du 12 novembre 1987 modifiant le décret n° 66-1078 du 31 décembre 1966 sur les contrats d'affrètement et de transport maritimes, tel que modifié et complété par le décret n° 69-679 du 19 juin 1969. [Decree n°87-922 from 12 November 1987, amending the decree n° 66-1078 from 31 December 1966 on contracts of affreightment and maritime transport as amended and supplemented by the decree n° 69-679 from 19 June 1969.]

[250] Loi du 18 juin 1966, art. 22: *"Le consentement du chargeur est supposé donné en cas de chargement en conteneur à bord de navires munis d'installations appropriées pour ce type de transport"*. [Law of 18 June 1966, Art. 22: The consent of the shipper is assumed to be given in case of loading of containers on board of vessels, which are provided with appropriate equipment for this type of transportation.]

[251] Le Droit Maritime Française, 62e année, n° 14, Juin 2010, p. 70, para. 76. See: Cour d'Appel de Paris (Pôle 5, 5e Ch.) – 11 février 2010 – Navire *Contship Germany* n°06-0653, where undeclared containerized deck cargo carried on a specially-designed container vessel was held an inexcusable breach because the containers were open-top (flat type). See also Cécile De Cet Bertin – *'Obligations du transporteur en pontée'*, [Octobre 2010] DMF 718, p. 796, at p. 802.

such carriage into "regular" and "irregular" deck carriage because the Rules do not make such a distinction.[252]

Thus, as previously observed, cargo, which is stated as carried on deck and is so carried, does not obey to the rules of the said Convention, and the carrier cannot avail himself of the defences and exceptions from responsibility stated therein because the Convention is inapplicable to that shipment; instead, the particular carriage is left to the contractual intention of the parties. On the contrary, if the deck carriage has not been agreed by the parties, the Convention will still apply. The resemblance with English law, however, ends up here.

In the recent case of *The "Ville de Tanya"*, which was defined by French authors as *"an unfortunate decision"*,[253] containers were carried on deck absent an agreement with the shipper, and during the journey they were lost overboard as a result of a typhoon which the vessel encountered on her way from China to Brazil.[254] The Court of Cassation was faced with, *inter alia*, the application of the Convention and with the carrier's defences under Article IV rule 2. With regard to the first issue, the Court held that a valid agreement for on-deck carriage (capable of excluding the application of the Convention) requires not only a declaration on behalf of the carrier on the face of the bill of lading but also an acceptance on behalf of the shipper.[255] This position, which is favourable to shippers and consignees, represents a shocking discrepancy with the wording of the Convention because, where the Rules say "declared", French law says "accepted". It seems that the Court of Cassation has imported an element from the first regime regulating deck cargo in France into the second regime.

Thus, a simple clause declaring on-deck cargo will not suffice to exclude the Convention as French courts require the carrier to have informed the shipper of the on-deck carriage and also to provide proof of this information, absent which international law (*i.e.* the Convention) will apply with all its rigour.[256] Thus, when the Brussels Convention is applied, a very puzzling approach is adopted with regard to establishing the shipper's consent to carriage of goods on deck. The Aix-en-Provence Court of Appeal in the *"Ville de Tanya"* maintained the highly-criticized position that, in establishing the shipper's acceptance, one should look in the Brussels Convention (the Rules).[257] This

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[252] Olivier Raison – *'Régimes applicables au transport en pontée : les confusions persistent (v. la note)'*, [Novembre 2013] DMF 752, p. 899, at p. 902.

[253] Yves Tassel – *'Le régime juridique de la « pontée » : un arrêt d'espèce malheureux'*, Le Droit Maritime Française, 60e année, n° 693, Juin 2008, p. 538, at p. 541: *"L'arrêt de rejet commenté doit être considéré comme un arrêt d'espèce malheureux."* [The commented judgment should be considered as an unfortunate decision.]

[254] Cour d'Appel d'Aix-en-Provence, 16 novembre 2006, *Ville de Tanya* : BTL 2007; Cour de Cassation (ch. com.) – 18 mars 2008 – Navire *Ville de Tanya* n° 07-11777.

[255] Cour d'Appel d'Aix-en-Provence, 16 novembre 2006, *Ville de Tanya* : BTL 2007. 573, obs. M. Tilche: *"un transport en pontée relevant de la Convention de Bruxelles amendée n'est pas « régulier » que dans la mesure où le chargeur a consenti à ce type de chargement"* [Aix-en-Provence Court of Appeal: a carriage on deck under the Brussels Convention, as amended, is "regular" only insofar as the shipper has consented to this type carriage].

[256] Le Droit Maritime Française, 62e année, n° 14, Juin 2010, p. 70, para. 76 (*ibid.*)

[257] Cour d'Appel d'Aix-en-Provence, 16 novembre 2006, *Ville de Tanya* : BTL 2007. 573, obs. M. Tilche: *"pour apprécier si le chargeur a consenti régulièrement ou non au chargement en pontée, il convient de se référer à la seule Convention de Bruxelles amendée et non à la loi française"* [in order to assess whether the shipper has regularly consented or not to deck carriage, it is necessary to refer only to the Brussels Convention, as amended, and not to French law].

position, which was later approved by the Court of Cassation, leads to the baffling situation where, in order to establish whether the on-deck declaration of the carrier is sufficient to exclude the Rules, one must refer to French law which requires the acceptance of the shipper, but in order to establish whether this acceptance is present, one must refer to the Rules – an approach which is far from being rational and is difficult to comprehend, even solely because of the absence in the said Convention of anything related to the shipper's acceptance.[258] That is why the French Professor Y. Tassel compares this ruling to a "manifest error of law" [«*erreur de droit manifeste*»].[259] It seems that the French courts overprotect the cargo owners as they give great importance to the factor how clearly the intended deck carriage has been agreed between the parties. The required level of knowledge of the shipper is raised to such an extent that not only a statement in the bill of lading is sufficient, but evidence of the shipper's consent is required as well. Such a rule, shaped by the French jurisprudence, is on the verge of being inconsistent with the wording of the Hague-Visby Rules.

Another point of criticism is that the Court of Cassation confirmed that in cases of unauthorized deck carriage the carrier cannot avail himself of the liability exemptions in Article IV rule of the Rules.[260] There is one exception, namely that if the cargo is stowed on a ro-ro vessel, then the breach is not considered inexcusable, meaning that the carrier can limit his liability.[261] In essence, such a complicated and carrier-unfriendly regime of deck carriage under French law leads to the question whether a possible future ratification of the Rotterdam Rules might provide a clearer and more balanced approach towards deck cargo.[262]

6.2 Germany

German maritime law is to be found in the Fifth Book of the Commercial Code – "Handelsgesetzbuch" (HGB), which entered into force on 1 January 1900 and which was mainly based, and basically unchanged, on the general German Commercial Code – "Allgemeine Deutsche Handelsgesetzbuch" (ADHGB), which dated back to 1861. Because the provisions of the HBG (*i.e.* the Commercial Code of the German Reich) were evidently outdated, several amendments were made throughout the years, and, for the purpose of the current sub-section, the most important revisions were the transmission of the 1924 Hague Rules and of the 1968 Visby Protocol. The Hague Rules entered into

[258] Yves Tassel – *'Le régime juridique de la « pontée » : un arrêt d'espèce malheureux'*, [Juin 2008] DMF 693, p. 538, at p. 541.
[259] Yves Tassel – *'Le régime juridique de la « pontée » : un arrêt d'espèce malheureux'*, [Juin 2008] DMF 693, p. 538, at p. 541 (*ibid.*)
[260] Cour de Cassation (Ch. Com.) – 18 mars 2008 – Navire *Ville de Tanya* n° 07-11777: *"la faute pour avoir chargé en pontée sans recueillir l'autorisation du chargeur prive [le transporteur maritime] de la possibilité de s'exonérer même partiellement de sa responsabilité en faisant la preuve du cas excepté prévu à l'article 4.2.c de la Convention de Bruxelles"* [Court of Cassation (Commercial Division): the breach of having loaded the cargo on deck, without obtaining permission from the shipper, deprives [the maritime carrier] of the opportunity to exonerate himself, even partially, from liability which he could otherwise do by proving an excepted case as laid down in Article 4 rule 2(c) of the Brussels Convention]. See also Cour d'Appel d'Aix-en-Provence (2e Ch.) – 14 septembre 2011 – Navire *Cap Camarat* – n° 10-01309, where undeclared deck carriage was considered a breach that could not be exonerated by the "perils of the sea" exception.
[261] Cour d'Appel d'Aix-en-Provence (2e Ch.) – 14 septembre 2011 – Navire *Cap Camarat* n° 10-01309. See also Jérôme de Sentenac – *'Pontée irrégulière, pontée fautive'*, DMF 737 [Juin 2012], p. 534, at p. 540 and 543.
[262] For carriage on deck under the Rotterdam Rules, see section 7 *infra*.

force in Germany in 1939 by means of the Sea Freight Act of 1937 ("Seefrachtgesetz von 1937"). Later, in 1986, the Hague-Visby Rules were incorporated in Germany's maritime law by means of the law of 25 July 1986 (2. "Seerechtsänderungsgesetz"), which was the next maritime amendment of the HGB, after the 1937 amendment, with regard to the carriage of passengers and goods.[263]

6.2.1 Applicable regime

The application of the Hague/Hague-Visby Rules is quite peculiar in Germany since the country ratified the Hague Rules (1924) and incorporated them in its Commercial Code (HGB) but it did not ratify either of the two Visby Protocols (1968/1979). Thus, Germany still remains a contracting state to the Hague Rules, which were not applied directly but are to be found only in the framework of the HGB. The revised provisions of the HGB apply to all types of carriage – comprising both liner carriage (under bills of lading) and tramp carriage (under charter parties) as well as both international trade and national trade.[264]

Although Germany is not a signatory state to the Visby Protocol of 1968 and has not formally ratified the Hague-Visby Rules, these were fully incorporated in the Fifth Book of the HGB in 1986.[265] In other words, the country has ratified the Hague Rules, and, though it does not adhere to the Visby Protocol, it has incorporated the provisions of the Visby Protocol in the German maritime law. Therefore, a vital question would arise for any maritime contracting party, and that would be whether the Brussels Convention 1924 (The Hague Rules), to which Germany is still a party, is applicable, or whether domestic law, which conforms to the Hague-Visby Rules is to apply. Germany's private international law offers a complicated provision, which settles this difficulty by providing choice of law rules for bills of lading. According to Article 6 of the Introductory Law to the Commercial Code ("Einführungsgesetz zum HGB") (EGHB), Germany's domestic law, which is modelled after the Hague-Visby Rules, will apply to all member states of the Visby Protocol as well as to states which are a party neither to the original Hague Rules nor to the Hague-Visby Rules, and also with regard to carriages from one German port to another provided that the ship flies the German flag. In particular, the provisions which embody the Hague-Visby Rules will apply when: (a) the bill of lading has been issued in a state party to the Hague-Visby Rules; or (b) the carriage is to or from a port

[263] Rolf Herber – *'German Law on the Carriage of Goods by Sea'*, reprinted in *'New Carriage of Goods By Sea: The Nordic Approach Including Comparisons With Some Other Jurisdictions'* (ed. by Hannu Honka), p. 343, at p. 344-346.

[264] Rolf Herber – *'German Law on the Carriage of Goods by Sea'*, reprinted in *'New Carriage of Goods By Sea: The Nordic Approach Including Comparisons With Some Other Jurisdictions'* (ed. by Hannu Honka), p. 343, at p. 344.

[265] Germany did not ratify the 1968 Visby Protocol for political reasons, namely to support the Hamburg Rules. Although the latter were opposed by the German shipowners and insurers, and although by 1986 it was already obvious that the Hamburg Rules would not be supported by the major maritime countries and, hence, would not become a leading maritime regime, the German Government and Parliament did not want to disappoint the states that took part in the Hamburg Conference by leaving the impression that Germany had completely given up on the Hamburg Rules. On the other hand, the country needed to modernize the outdated Hague Rules regime, and the wide incorporation of the provisions of the Visby Protocol was considered an appropriate step. As far as the ratification of the Hague-Visby Rules by the German Democratic Republic is concerned, that ratification expired when the country reunified with the Federal Republic of Germany. See: Rolf Herber – *'German Law on the Carriage of Goods by Sea'*, reprinted in *'New Carriage of Goods By Sea: The Nordic Approach Including Comparisons With Some Other Jurisdictions'* (ed. by Hannu Honka), p. 343, at p. 346.

in such a state or in Germany; or (c) the bill of lading refers expressly to the Hague-Visby Rules or to the law of a state which has incorporated the Hague-Visby Rules into its legislation.[266] This comprehensive wording means that the Visby Protocol will apply in the vast majority of cases.

However, the unamended Hague Rules will still apply with regard to contracting states to the Hague Rules – *i.e.* when the bill of lading is issued in such a state (including Germany), *and*: (1) the carriage is from a Hague Rules country (including Germany) to another Hague Rules country; or (2) the carriage is between two German ports provided that the vessel flies a foreign (*i.e.* non-German) flag; or (3) the carriage is from a country, which is neither a Hague Rules country nor a Hague-Visby Rules country, to a Hague Rules country.[267] Such application of the unamended Rules, though in very limited situations, is because of the Germany's obligations towards these Hague Rules states, which result, under international law, from the German ratification of the Brussels Convention 1924 (the original Hague Rules).

6.2.2 The maritime law reform

The amendments adopting the Hague and the Hague-Visby Rules were considered only a patch-up and were not adjusted to modern developments.[268] Therefore, an amendment was needed of the statutory provisions of Germany's maritime law. This modernization of law came into existence with the latest revision of Germany's maritime law (the Fifth Book of the HGB), which came into effect on 25 April 2013, after nearly a decade of discussions and considerations on a new maritime law reform in Germany.[269] This complete revision of HGB's Fifth Book modernized and simplified the German maritime law.[270] An overview of the most significant changes to German maritime law is beyond the scope of the current thesis but what suffices to be said in relation to deck carriage are two important points.

The first one relates to the executing carrier under German law and, in particular, who is to be held responsible for carriage on deck. German law distinguishes between a contractual carrier and an actual carrier, the latter being the person or company which in effect performs part or all of the transport but which cannot qualify as a contractual carrier.[271] Thus, the concept of an actual carrier includes sub-carriers, charterers (disponent owners), and terminal operators. According to Article 509 HGB, the actual carrier is jointly liable with the contractual carrier with regard to damages that occurred during the carriage performed by him as if he would be the contractual carrier. This statutory provision will apply when German law is applicable to the main contract between the owner (the contractual carrier) and the shipper, regardless of what has been agreed between the contractual carrier and the actual carrier in their separate

[266] See: Article 6 para. 1 of EGHB.
[267] See: Article 6 para. 2 of EGHB.
[268] Michael Karschau – *'Reform of German maritime law underway'*, Maritime Risk International, September 2013, p. 16.
[269] Michael Karschau – *'Reform of German maritime law underway'*, Maritime Risk International, September 2013, p. 16 (*ibid.*).
[270] Dr. Christoph Horbach – 'New German Maritime Legislation', Hamburg, February 2014, retrieved from: http://www.standard-club.com/media/973952/maritime-law-reform.pdf.
[271] Dr. Christoph Horbach – 'New German Maritime Legislation', Hamburg, February 2014, at p. 3, retrieved from: http://www.standard-club.com/media/973952/maritime-law-reform.pdf.

contract.[272] Article 509 HGB will held the actual carrier (*e.g.* a terminal operator loading cargo on deck) responsible for damages, even when there is no direct contractual link between him and the cargo interests.[273]

The second point, which is of importance to carriage of cargo on deck, is related to the incorporation of charterparty terms, such as a deck cargo clause, into bills of lading. According to Article 522 HGB, the terms of a charter party are validly incorporated in a bill of lading only if these terms are explicitly reproduced in the bill. On the contrary, a mere reference to those charterparty terms is not sufficient, under German law, to hold these terms valid under the bill of lading. For example, clause 1 of the conditions of carriage in CONGENBILL 2007 states that *"All terms and conditions, liberties and exceptions of the Charter Party, dated as overleaf, including the Law and Arbitration Clause/Dispute Resolution Clause, are herewith incorporated."* Thus, the standard form of this BIMCO bill of lading, which is to be used with charter parties, contains general incorporation of charterparty terms which will not be valid under German law, and, therefore, the terms will not be accepted as clauses of the bill of lading. This means that under the revised German maritime law, charterers have to redraft their bills of lading so that the charterparty terms, which are envisaged to be incorporated, are written explicitly on the bill of lading.

6.2.3 Deck carriage

Under the revised German maritime law, cargo cannot be carried on deck unless there is an approval on behalf of the shipper.[274] However, it is important that, unlike under English law, the consent of the shipper under German law may be declared impliedly.[275] For example, when on the face of the bill of lading there is an option to stow on deck, and if the shipper does not object to that optional deck stowage, this will be held as an acceptance to carriage on deck.[276] This means that, unlike English law and especially in contrast to French law where the shipper's consent is required, German law provides significantly less protection to deck cargo owners. Furthermore, Germany's revised maritime law provisions took into account containerization, so when the cargo is carried in containers or in another type of a *"loading device suitable for the carriage on deck"*, and if the vessel is specifically equipped for deck carriage, such consent is not necessary.[277] Again, in the container trade carried out by specially-built container

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[272] Michael Karschau – *'Reform of German maritime law underway'*, Maritime Risk International, September 2013, p. 16.

[273] Gregor Harbs – *'Germany Introduces New Maritime Law: An update of the 150-year old German Maritime Code'*, Gard News, Issue 211, August/October 2013, p. 28.

[274] Article 486 HGB, para 4: *"Der Verfrachter darf das Gut ohne Zustimmung des Befrachters nicht auf Deck verladen. Wird ein Konnossement ausgestellt, ist die Zustimmung des Abladers (§ 513 Absatz 2) erforderlich.[…]"* [The carrier must not load the goods on deck without the consent of the charterer. If a bill of lading is issued, the consent of the merchant (§ 513, paragraph 2) is required.]

[275] Rolf Herber – *'German Law on the Carriage of Goods by Sea'*, reprinted in *'New Carriage of Goods By Sea: The Nordic Approach Including Comparisons With Some Other Jurisdictions'* (ed. by Hannu Honka), p. 343, at p. 355.

[276] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), Vol. 1, Chapter 31, p. 1573, fn. 13.

[277] Article 486 HGB, para 4: *"[…] Das Gut darf jedoch ohne Zustimmung auf Deck verladen werden, wenn es sich in oder auf einem Lademittel befindet, das für die Beförderung auf Deck tauglich ist, und wenn das Deck für die Beförderung eines solchen Lademittels ausgerüstet ist."* [The cargo may, however, be loaded on deck without consent if it is in or on a loading device suitable for the carriage on deck, and when the deck is equipped for the carriage of such cargo.]

vessels, the traditional doctrine on deck cargo and its concept, requiring an informed consent and clear communication of the risks, are rendered inapplicable.

In case of an unauthorized deck carriage, Article 500 HGB (Unauthorized loading on deck) states that there is a presumption of liability on the part of the carrier even if he is not at fault and the loss or damage is caused solely by the risks inherent in deck carriage.[278] Moreover, the carrier cannot rely on any exemptions or limitations of liability if he has agreed with the shipper to transport the goods below deck but has, nevertheless, loaded them on deck.[279]

In case of authorized deck carriage, the carrier's liability is excluded to the extent that the loss, damage or delay in delivery is due to the carriage on deck.[280] Damage that could arise because of deck carriage, depending on the circumstances of the case, is assumed to have resulted from deck carriage. This presumption, however, does not apply to cases of exceptionally great loss.[281] Equally important, the carrier cannot avail of this general deck-cargo exception from liability, either, when the loss, damage or delay in delivery of the goods is due to the fact that the carrier has not complied with any special instructions given to him by the consignor with respect to the carriage of the goods.[282]

The current German regime on deck cargo is likely to last for a considerable period of time provided that the last reform took place just a few years ago. Germany has not incorporated the Hamburg Rules, nor did it take the Rotterdam Rules into account. The latter may be adopted only in a further reform of Germany's maritime law, *"if [and*

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[278] Article 500 HGB: "Hat der Verfrachter ohne die nach § 486 Absatz 4 erforderliche Zustimmung des Befrachters oder des Abladers Gut auf Deck verladen, haftet er, auch wenn ihn kein Verschulden trifft, für den Schaden, der dadurch entsteht, dass das Gut auf Grund der Verladung auf Deck verloren gegangen ist oder beschädigt wurde. Im Falle von Satz 1 wird vermutet, dass der Verlust oder die Beschädigung des Gutes darauf zurückzuführen ist, dass das Gut auf Deck verladen wurde." [In case the carrier loaded the goods on deck without the required consent of the shipper (required under Article 486 paragraph 4), he is liable, even if he is not at fault for the damage caused by the fact that the goods are lost or damaged due to the loading on deck. In the case of the first sentence, it is assumed that the loss or damage to the goods is due to the fact that the material was loaded on deck.]

[279] Article 507 HGB: "Die in diesem Untertitel und im Stückgutfrachtvertrag vorgesehenen Haftungsbefreiungen und Haftungsbegrenzungen gelten nicht, wenn: […] 2. der Verfrachter mit dem Befrachter oder dem Ablader vereinbart hat, dass das Gut unter Deck befördert wird, und der Schaden darauf zurückzuführen ist, dass das Gut auf Deck verladen wurde." [The measures provided for in this subtitle on general cargo contract liability exemptions and limitations of liability shall not apply if: […] 2. the carrier has agreed with the charterer or the shipper that the cargo will be transported under cover, and the damages are due to the fact that the cargo was loaded on deck.]

[280] Article 427 HGB, para 1: *"Der Frachtführer ist von seiner Haftung befreit, soweit der Verlust, die Beschädigung oder die Überschreitung der Lieferfrist auf eine der folgenden Gefahren zurückzuführen ist: 1. vereinbarte oder der Übung entsprechende Verwendung von offenen, nicht mit Planen gedeckten Fahrzeugen oder Verladung auf Deck;* […]" [The carrier shall be relieved of liability to the extent that the loss, damage or delay in delivery is due to the following hazards: 1. Agreed and exercised appropriate use of open vehicles or loading on deck.]

[281] Article 427 HGB, para 2: "Ist ein Schaden eingetreten, der nach den Umständen des Falles aus einer der in Absatz 1 bezeichneten Gefahren entstehen konnte, so wird vermutet, daß der Schaden aus dieser Gefahr entstanden ist. Diese Vermutung gilt im Falle des Absatzes 1 Nr. 1 nicht bei außergewöhnlich großem Verlust." [The occurrence of damages that could arise from the risks referred to in paragraph 1 to the circumstances of the case, it is assumed that the damages have resulted from this danger. This presumption does not apply in the case of paragraph 1, number 1 when there is an exceptionally great loss.]

[282] Article 427 HGB, para 3: "Der Frachtführer kann sich auf Absatz 1 Nr. 1 nur berufen, soweit der Verlust, die Beschädigung oder die Überschreitung der Lieferfrist nicht darauf zurückzuführen ist, daß der Frachtführer besondere Weisungen des Absenders im Hinblick auf die Beförderung des Gutes nicht beachtet hat. " [The carrier may only invoke paragraph 1, number 1 to the extent that the loss, damage or delay in delivery is not due to the fact that the carrier has not complied with any special instructions of the consignor with respect to the carriage of goods.]

not when!] the Rotterdam Rules have been ratified by Germany".[283] For the time being, and considering the background of Germany's current maritime law, this does not seem as a viable development.

6.3 The Netherlands

The Netherlands have ratified the Visby Protocols (1968/1979), and, thus, the country has applied the Hague-Visby Rules since 1982.[284] The Rules are incorporated in Book 8 of the Dutch Civil Code, dedicated to Transport law and means of transport.[285] The law regulating deck cargo is codified in Article 382 of Book 8:

> *Article 8:382 Mandatory law in case of carriage under a bill of lading:*
>
> *1. Any clause in a contract of carriage under a bill of lading relieving the carrier or the ship from liability for loss of or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided for in Articles 8:381, 8:399, 8:411, 8:414 paragraph 1, 8:492, 8:493 or 8:1712 or lessening such liability otherwise than in the way as provided for in the present Section (Section 8.5.2) or in Articles 8:361 up to and including 8:366, shall be null and void and of no effect. A clause as a result of which the benefit under an insurance policy belongs to the carrier or any clause with a similar necessary implication shall be deemed to be made in order to relieve the carrier from his liability.*
>
> *2. Notwithstanding paragraph 1, a clause as mentioned there shall be valid if it concerns:*
>
> *a. a permitted clause concerning general average;*
> *b. live animals;*
> c. *goods which actually are transported on the deck provided that they are specified in the bill of lading as deck cargo*. [emphasis added][286]

Article 382 reflects Article I(c) and Article III rule 8 of the Hague-Visby Rules. The first paragraph of the provision forbids parties to contract out from their obligations under Article 381 (the duty to exercise due diligence as to seaworthiness and care for the

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[283] Michael Karschau – *'Reform of German maritime law underway'*, Maritime Risk International, September 2013, p. 16, at p. 17.

[284] Although the Netherlands was a party to the Hague Rules as of 1956, these Rules are nowadays denounced by the country.

[285] The relevant provisions are to be found in section II of Book 8 of the Civil Code, which is dedicated to maritime law.

[286] Burgerlijk Wetboek Boek 8, Artikel 382:

1.Nietig is ieder beding in een vervoerovereenkomst onder cognossement, waardoor de vervoerder of het schip wordt ontheven van aansprakelijkheid voor verlies of beschadiging van of met betrekking tot zaken voortvloeiende uit nalatigheid, schuld of tekortkoming in het voldoen aan de verplichtingen in de artikelen 381, 399, 411, 414 eerste lid, 492, 493 of in artikel 1712 voorzien of waardoor deze aansprakelijkheid mocht worden verminderd op andere wijze dan in deze afdeling of in de artikelen 361 tot en met 366 is voorzien. Een beding, krachtens hetwelk de uitkering op grond van een gesloten verzekering aan de vervoerder komt of elk ander beding van dergelijke strekking, wordt aangemerkt als te zijn gemaakt teneinde de vervoerder van zijn aansprakelijkheid te ontheffen.

2.Niettegenstaande het eerste lid is een beding, als daar genoemd, geldig mits het betreft:

a. een geoorloofd beding omtrent avarij-grosse;
b. levende dieren;
c. *zaken, die feitelijk op het dek worden vervoerd mits deze in het cognossement als deklading zijn opgegeven.*

cargo), Article 399 (the duty to issue a bill of lading), Article 411 (consignor's duty to provide correct information), Article 414 paragraph 1 (over the evidential value of the bill of lading), Article 492 (legal presumption regarding the condition of the goods), Article 493 (duty to cooperate in inspection of goods and tallying of packages), and Article 1712 (time limitations under bills of lading), or to lessen howsoever the carrier's liability as stated in the relevant provisions of Book 8, and renders any such clauses as null and void. Additionally, paragraph two, item c of Article 382 makes an exception to such clauses, notwithstanding paragraph 1, when *"goods which actually are transported on the deck provided that they are specified in the bill of lading as deck cargo"*. Thus, Article 382 paragraph 2 covers "deck cargo" within the meaning of the Article I(c) of the Rules, and deck cargo, which is not specified as such in the bill of lading, is a subject to the liability regime of the Hague-Visby Rules.[287]

In essence, cargo should not be loaded on deck without the consent of the shipper, which is similar to the position under English law. However, under Dutch law, even when there is no consent on behalf of the shipper, the carrier can still prove that carriage on deck is not mishandling in and of itself if he manages to show that such carriage is not a breach of the contract in the light of the nature of the cargo, the nature of the means of transport, and other circumstances. However, if there has been an agreement for below-deck carriage, the carrier cannot rebut the assumption of mishandling and breach of contract.[288]

In practice, an on-deck statement that the cargo is in fact carried on deck is accompanied by a *'deck cargo at shipper's risk'* clause.[289] Dutch courts, however, interpret the scope of this clause controversially. Under English law, the same uncertainty was observed as to the width of this exception clause. In the Dutch case *"Anna-Bella"*, the Court in the Hague held that such a clause was considered as a complete exoneration from liability for damage to deck cargo for any cause whatsoever, and the entire risk shifted to the cargo interests.[290] Such a wide interpretation of the deck cargo clause was also observed in the case *"Lijnbaansgracht"* before the Court of Amsterdam.[291] However, the court in *"Jeannie"* made a distinction between non-responsibility clauses (wide enough to except any responsibility related to deck cargo) and shipper's risk clauses (which covered only risks directly associated with the on-deck carriage, and does not except the carrier from his own fault such as insufficient lashing or wrong stowage).[292] Furthermore, such a clause was held not to protect the carrier when damage to deck cargo was due to breach of the carrier's unseaworthiness obligation.[293] Nor will it be held a valid defence for the carrier when the damage to deck cargo is caused by the carrier's negligence unless the parties have agreed to encompass negligence as well.[294] Amidst these conflicting decisions, Dutch scholars tend to prefer the interpretation in the *"Anna-Bella"* decision, namely that the clause relieves the

[287] H. Boonk – *'Zeevervoer onder cognossement'*, Gouda Quint BV, Arnhem (1993), p. 64-65.
[288] H. Boonk – *'Zeevervoer onder cognossement'*, Gouda Quint BV, Arnhem (1993), p. 65-66.
[289] H. Boonk – *'Zeevervoer onder cognossement'*, Gouda Quint BV, Arnhem (1993), p. 66.
[290] Hof Den Haag 3/1/75 S & S 75, 42 (Anna-Bella).
[291] Rechtbank Amsterdam 23/3/60 S & S 60, 54 (Lijnbaansgracht).
[292] Rechtbank Amsterdam 1/3/72 S & S 72, 72 (Jeannie).
[293] Rechtbank Amsterdam 5/10/88 S & S 91, 136 (Westfjord).
[294] Hoge Raad 7/3/69 NJ 69, 249 (Gegaste Uien).

carrier from liability even when he failed to carry out his duties to properly and carefully care for the cargo.[295]

With regard to unauthorized deck carriage, the absence of such a clause, stipulating deck carriage, will render the carrier liable according to the liability provisions of the Hague-Visby Rules as incorporated in Book 8 of the Dutch Civil Code.[296] This suggests that the doctrine of fundamental breach has no application whatsoever as far as deck cargo under Dutch law is concerned.

6.4 Norway

Norway has denounced the Hague Rules but the Hague-Visby Rules are active and are codified in Chapter 13 (Carriage of General Cargo) of the Norwegian Maritime Code of 24 June 1994. The Norwegian Maritime Code has a long legislative history and its provisions are very close, but not identical, to those of the maritime codes of the other Scandinavian countries (*i.e.* Sweden, Finland, and Denmark).[297]

Section 263 of the Code governs carriage of goods on deck as follows:

> ***Section 263 Deck Cargo***
>
> *Goods can be carried on deck only if this is in accordance with the contract of carriage, custom of the trade or other usage in the trade in question or is required by statutory rules or regulations based on statutory rules.*
>
> *If, according to the contract, the goods may or shall be carried on deck, this shall be stated in the transport document. If this has not been done, the carrier has the burden of proving that carriage on deck was agreed. The carrier cannot invoke such an agreement against a third party who has acquired the bill of lading in good faith.*
>
> *Special rules on liability for deck cargo are contained in Section 284.*

The provision regulates deck carriage in a clear and consistent way, although it does not address specifically containerized cargo. According to Section 263, the carrier is permitted to load and carry cargo on deck only in three situations: (1) when such carriage is in accordance with the contract of carriage; (2) when it is in accordance with the custom of the trade or other usage in the trade in question; or (3) when deck carriage is required by law (*e.g.* applicable with regard to some dangerous goods). With regard to the first category of deck cargo, Section 263 requires that such deck carriage is stated in the transport document. A definition of a "transport document" is provided in Section 251, which states that this means *"a bill of lading (konnossement) or other document issued as evidence of the contract of carriage"*. The term "other document" further refers to a sea waybill (*sjøfraktbrev*) which is defined in Section 308. Therefore, if the contract of carriages envisages deck carriage, the carrier is required to state that in the bill of lading or sea waybill. However, if he fails to insert such a statement, he is not automatically held liable but he has the burden of proving that an agreement to carry on

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[295] See: H. Boonk – *'Zeevervoer onder cognossement'*, Gouda Quint BV, Arnhem (1993), p. 68; H. Schadee – '*Het Nieuwste Zeerecht*', p. 18.
[296] H. Boonk – *'Zeevervoer onder cognossement'*, Gouda Quint BV, Arnhem (1993), p. 67.
[297] Thor Falkanger, Hans Jacob Bull, Lasse Brautaset – *'Scandinavian Maritime Law'*, (3rd edition), Universitetsforlaget AS (2011), p. 26.

deck exists. If the contract of carriage is evidenced by and contained in a bill of lading, such failure to state deck cargo are, in general, more severe.[298] This is because an on-deck agreement cannot be invoked with regard to a third party bill of lading holder who has acquired the bill of lading in good faith, and this bill of lading does not state that goods may or shall be carried on deck.

The carrier is subject to different liability depending on whether deck cargo was in accordance with Section 263 or in breach of it. In the first case, when cargo was legitimately carried on deck, the normal liability rules of the Norwegian Maritime Code will apply. This means that legitimate deck cargo is governed by the same liability rules as under-deck cargo, which rules are laid down in Chapter V (The Carrier's Liability for Damages) in sections 274-289.[299] However, it is not possible to subject deck cargo to more lenient rules than below-deck cargo.[300]

When the goods are carried on deck in breach of Section 263 (which will be the result also when the carrier cannot prove an agreement for deck carriage absent a statement in the transport document, or cannot invoke such an agreement against a third party), then the special rules on liability in Section 284 apply:

> ***Section 284 Liability for deck cargo***
>
> *If goods are carried on deck in breach of Section 263, the carrier is liable, irrespective of the provisions of Sections 275-278, for losses which are exclusively the consequence of the carriage on deck. Concerning the extent of the liability, Sections 280 and 283 apply.*
>
> *If goods have been carried on deck contrary to an express agreement for carriage under deck, there is no right to limitation of liability according to this Chapter.*

The provision bans the carrier in fault from relying on sections that would otherwise exonerate him such as in the cases of nautical fault or fire. The carrier is deprived of its defences, however, if the deck cargo has been damaged or lost for reasons which are exclusively the consequence of the deck carriage. Thus, for example, if cargo that is illegitimately carried on deck is damaged because of a navigational error, the carrier may exonerate himself, relying on the nautical fault defence, only if this navigational error equally affected on-deck and below-deck cargo, making it irrelevant, for establishing the cause of damage or lost, where the cargo was stowed. Section 284, however, preserves the carrier's right to limit his liability in cases of illegitimate deck cargo.

The right to limit liability is definitively lost in the specific case when carriage on deck took place contrary to an express written or oral agreement to carry under deck. This approach towards a carrier, who loads on deck in breach of an agreement with the shipper to carry below deck, is also to be found in the Rotterdam Rules.[301]

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[298] Thor Falkanger, Hans Jacob Bull, Lasse Brautaset – *'Scandinavian Maritime Law'*, (3rd edition), Universitetsforlaget AS (2011), p. 300.
[299] See: ND 2005.395 DCA (*Royal Arctic Line)* and ND 2005.574 DCC FEDERAL MACKENZIE.
[300] Thor Falkanger, Hans Jacob Bull, Lasse Brautaset – *'Scandinavian Maritime Law'*, (3rd edition), Universitetsforlaget AS (2011), p. 301.
[301] See section 10.3 *infra.*

6.5 Sweden

Sweden has also denounced the Hague Rules and currently applies the Hague-Visby Rules. The Swedish Maritime Code (2006) was last amended in 2013. The provision governing deck cargo has not been changed:

> ***Deck cargo***
>
> ***Section 13.*** *Goods may be carried on deck only if it is allowed by the contract of carriage, follows from any custom or usage of the trade in question or is required by any law or statutory provision*
>
> *If according to the contract the goods shall or may be carried on deck, this shall be indicated in the transport document. If this has not been done, the carrier must prove that carriage on deck has been agreed. The carrier may not invoke such agreement against any third party who has acquired the bill of lading in good faith.*
>
> *Special rules on liability for deck cargo are provided in section 34.*

Since the provision is essentially matching the respective section in the Norwegian Maritime Code, it will not be elaborated further.

7. Deck cargo under the Rotterdam Rules

7.1 A modernized approach to deck cargo

From the previous sections, it is evident that the development of the law on deck cargo has come a long way. So are the vessels, the technology, and the entire shipping industry. In the early XX century, when the Hague Rules were negotiated, carriage of goods on deck was a very exceptional case because it bore substantial risks *"that it is not fair to put upon the carrier"*.[302] Only in some specific trades, such as carriage of timber, was deck cargo not considered an unusual practice. This is also the reason behind the exclusion of deck carriage from the scope of the Hague Rules (Article I(c)).[303] Already at the First Session of the Hague Conference, it was *"pointed out [by the Chairman] that this trade was subject to such uncertainties that it did not seem possible to take account of them in a convention covering the carriage of goods in general."*[304] Four decades later, the

[302] Comité Maritime International – *'The Travaux Préparatoires Of The International Convention For The Unification Of Certain Rules Of Law Relating To Bills Of Lading Of 25 August 1924 The Hague Rules And Of The Protocols Of 23 February 1968 And 21 December 1979 The Hague-Visby Rules'*, at p. 109.

[303] Some of the drafters of the Hague Rules went that far to also consider excluding even "perishable goods" from the scope of the Convention, to which a valuable remark was made by another delegate at the Hague Conference. Mr. Dor: *"If we exclude everything except bricks and iron bars there is not much use in having such rules. If we exclude all the goods which may be damaged, then the rules are not of much good."* See: Comité Maritime International – *'The Travaux Préparatoires Of The International Convention For The Unification Of Certain Rules Of Law Relating To Bills Of Lading Of 25 August 1924 The Hague Rules And Of The Protocols Of 23 February 1968 And 21 December 1979 The Hague-Visby Rules'*, para [79] at p.131 and p. 648.

[304] Comité Maritime International – *'The Travaux Préparatoires Of The International Convention For The Unification Of Certain Rules Of Law Relating To Bills Of Lading Of 25 August 1924 The Hague Rules And Of The Protocols Of 23 February 1968 And 21 December 1979 The Hague-Visby Rules'*, Diplomatic Conference - October 1922, Meetings of the Sous-Commission, First Session (19 October 1922), at p. 132.

drafters of the Visby Protocol (1968) also found it unnecessary to address deck carriage and to include provisions which regulate such type of sea carriage.[305]

The problem of deck carriage under the Hague-Visby Rules, however, is mainly that old principles are applied to new realities and to modern shipping practices.[306] Nowadays deck carriage is no longer considered an improper system to transport goods by sea, and it is in fact a very common one with regard to both containerized and non-containerized goods. With regard to deck cargo, there are two major developments that took place in the shipping industry and these are the container revolution and the consequent innovations in ship design.[307] These two developments blurred the previously clear distinction between on-deck carriage and below-deck carriage; and the logic behind Article I(c) of the Hague and Hague-Visby Rules is based exactly on that distinction. Nowadays, however, undesirable results are yielded when applying these outdated deck cargo rules to the contemporary shipping practices, where even the notion of on-deck and under-deck is not that certain anymore, especially when applied to container vessels.[308] For example, some container vessels do not have hatches covering their holds and that is why, in this case, the tanktop in the hold will be considered their "deck".[309]

The Rotterdam Rules, on the other hand, take into account these developments, namely containerization and specialized deck vehicles of carriage, which are viewed as the 'backbone' of deck carriage.[310] The new Convention no longer excludes deck cargo from the regulatory regime. What is more, the Rotterdam Rules apply an all-embracing net that applies to all *goods* and include even a provision for live animals.[311]

> ***Article 1***
> ***Definitions***
> *[…]*
> *24. "Goods" means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.*

The definition provided in Article 1.24 suggests that whatsoever goods, in any manner of stowage and package, both below deck and on deck, authorized and

[305] However, it is worth noting that deck cargo was within the drafters' agenda but eventually this proposal was rejected because deck carriage was considered being not "of sufficient practical importance". See: CMI Stockholm Conference Report 1963, at p. 87.
[306] D. Rhidian Thomas – *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'* (2009), at p. 80.
[307] Dr. Susan Hodges and David A Glass – *'Deck Cargo: Safely stowed at last or still at sea?'*, reprinted in *'The Carriage of Goods by Sea under the Rotterdam Rules'* (edited by D Rhidian Thomas), London (2010), at p. 238.
[308] Working Group III (Transport Law), 10th session (Vienna 16-20 September 2002), para 78: *"It was explained that approximately 65% of the container-carrying capacity of a vessel was usually on or above its deck, such that for operational reasons it was important for container carriers to have the operational flexibility to decide where to carry the containers."*
[309] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), p. 126.
[310] Dr. Susan Hodges and David A Glass – *'Deck Cargo: Safely stowed at last or still at sea?'*, reprinted in *'The Carriage of Goods by Sea under the Rotterdam Rules'* (edited by D Rhidian Thomas), London (2010), at p. 257.
[311] The Rotterdam Rulers, Article 81: Special rules for live animals and certain other goods.

unauthorized, are subject to the Rotterdam Rules and governed by its provisions. Furthermore, the Convention offers a completely new set of rules that apply to deck cargo and that are codified in Article 25 entitled *'Deck cargo on ships'*, which is found in Chapter 6 of the Rules (*'Additional provisions relating to particular stages of carriage'*). Under the Rotterdam Rules, deck cargo is no longer divided into authorized (declared) and unauthorized (undeclared) but into permissible and non-permissible deck carriage.

7.2 Permissible deck carriage

The first paragraph of Article 25 lists three categories of permissible carriage on deck:

> ***Article 25***
> ***Deck cargo on ships***
> *1. Goods may be carried on the deck of a ship only if:*
> *(a) Such carriage is required by law;*
> *(b) They are carried in or on containers or vehicles that are fit for deck carriage, and the decks are specially fitted to carry such containers or vehicles; or*
> *(c) The carriage on deck is in accordance with the contract of carriage, or the customs, usages or practices of the trade in question.*

The phrase "only if" in Article 25.1 implies that deck carriage in all instances, other to the three circumstances indicated in (a), (b), and (c), will be considered non-permissible and, hence, unauthorized.

Article 25.1(a) allows carriage on deck in the various situations when this is required by law. This could be the case with dangerous cargo to which specific safety regulations apply (*e.g.* the IMDG Code or the IMSBC Code), which require that the particular hazardous substances are carried on deck only.

Article 25.1(b) takes into account containerization. The provision governs deck carriage of goods that are carried in or on containers or vehicles that are fit for deck carriage provided that the deck of the vessel is specially fitted for such carriage, which means that it must cover certain technical standards for stowing, lashing, and securing the containers or vehicles.[312] Some authors refer to that quality of the vessel as "deck-cargoworthiness", and if she fails to cover these standards, the carrier will be liable.[313] On the other hand, the definition of a "container" and of a "vehicle" in Article 1.26 and 1.27, respectively, reads as follows:

> ***Article 1***
> ***Definitions***
> *[…]*

[312] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), p. 127.
[313] Dr. Susan Hodges and David A Glass – *'Deck Cargo: Safely stowed at last or still at sea?'*, reprinted in *'The Carriage of Goods by Sea under the Rotterdam Rules'* (edited by D Rhidian Thomas), London (2010), at p. 264.

> *26. "Container" means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.*
>
> *27. "Vehicle" means a road or railroad cargo vehicle.*

The first definition is very broad and embraces, essentially, any type of containers including semi-closed and open-top containers. Similarly, the second definition includes both road cargo vehicles and rail cargo vehicles. This means that specialized containerships as well as ro-ro vessels, which normally carry cargo vehicles and trailers, comply with the requirements fall under the provision of Article 25.1(b). In essence, the provision offers the carrier flexibility as to where to stow the goods (below deck or under deck) provided that the cargo and the vessel meet the conditions set forth in the article.

Article 25.1(c) permits carriage on deck when such carriage is in accordance with the contract of carriage or the customs, usages or practices of the trade in question. This agreement may be explicitly stipulated by the parties but it may also be implied in case there are usages, customs, or practices, according to which the cargo in a particular trade may be carried on deck.[314] An example of such shipments is the carriage of woods on deck as well as the carriage of large and out-of-gauge equipment such as yachts, wind mills, drilling platforms, *etc.*

When the carriage on deck is governed by any of these three subsections of Article 25.1, the carriage is permissible, meaning that it is permitted by the Rotterdam Rules and a breach of contract cannot result from such carriage. Under subparagraphs (a) and (c), carriage will be permissible regardless of the type of the vessel, whereas subparagraph (b) requires the use of specially designed ships which include not only container vessels but any other ships which are fitted to carry containers or deck-carriage vehicles on board.

Furthermore, one big difference of the Rotterdam Rules, as compared to the Hague-Visby Rules, is that the normal liability rules of the new Convention are equally applicable to all three types of deck cargo. The relevant Article 25.2 reads:

> ***Article 25***
> ***Deck cargo on ships***
>
> *[…]*
>
> *2. The provisions of this Convention relating to the liability of the carrier apply to the loss of, damage to or delay in the delivery of goods carried on deck pursuant to paragraph 1 of this article, but the carrier is not liable for loss of or damage to such goods, or delay in their delivery, caused by the special risks involved in their carriage on deck when the goods are carried in accordance with subparagraphs 1 (a) or (c) of this article.*

When speaking of the carrier's obligations over deck cargo and the ensuing liability, it is worth reminding that the fact that goods are stowed on deck must be taken in consideration when assessing the duty to care for the cargo. Deck cargo is exposed to the weather elements and, therefore, it may require a higher duty of care (*e.g.* covering

[314] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), p. 127 (*ibid.*).

with tarpaulins to protect the goods from heat or rain) than cargo that is stowed below deck. However, the carrier, under the Rotterdam Rules, retains his right to limit liability and, furthermore, he will be excepted from liability for the loss of, damage to, or delay in the delivery of deck cargo, carried in accordance with subparagraphs 1(a) and 1(c), if these are caused by the special risks that are involved in deck carriage.

Two points deserve attention with regard to paragraph 2 of Article 25. Firstly, this carrier-friendly qualification does not apply to containerized cargo and deck vehicles. It addresses only deck cargo that is required to be so carried by law (subparagraph 1(a)) and deck cargo, which is carried in accordance with the contract of carriage, or the customs, usages or practices in the particular trade (subparagraph 1(c)). The reason why not all three categories of deck cargo fall under this provision is probably that subparagraphs (a) and (c) leave no choice for the carrier and the shipper but to stow and carry the goods on deck, whereas subparagraph (b) allows for discretion as to the location of the cargo. Secondly, the Rotterdam Rules do not provide a definition of "special risks" but, presumably, these are the inherent risks that are associated with cargo being washed overboard or damaged because of the exposure to weather and seawater as the most important factors in assessing those risks are the nature of the cargo and the circumstances of the voyage.[315] In that sense, if the risks are likely to appear both to below-deck cargo and to on-deck cargo, then these risks are not "special risks" (*e.g.* fire caused by the nature of an adjacent cargo). On the contrary, if the risks are specific to carriage on deck, then the exception from liability provision in paragraph 2 will apply (*e.g.* fire caused by the natural elements such as a lightening or seawater causing a chemical reaction). Thus, the qualification in Article 25.2 represents a specialized version of the liability provision in Article 17.2 to the extent that the cause for loss, damage or delay cannot be attributed to the carrier.[316]

Finally, there is a widely shared view that, besides these three categories listed under (a), (b), and (c), there is also a fourth category in Article 25 and this is namely any deck carriage, which is not governed by one of these three subsections.[317] Grounds for recognizing such a category of deck carriage is Article 25.3, which speaks of *"goods carried on deck in cases other than those permitted pursuant to paragraph 1 of this article"*. In the current thesis, however, any on-deck shipment that is not covered by Article 25.1 will be regarded as non-permissible deck carriage as opposed to the three categories listed in paragraph 1.

7.3 Non-permissible deck carriage and the carrier's liability

As already explained in *Chapter II*, section 5.6 above, the Rotterdam Rules apply a fault-based system of establishing liability and available defences. And this system

[315] The authors of *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), on p. 129, describe the special risks as: *"…those that, for the specific goods and under the circumstances of the voyage, generally follow from their carriage on deck"*.

[316] Article 17.2 of the Rotterdam Rules reads: "The carrier is relieved of all or part of its liability pursuant to paragraph 1 of this article if it proves that the cause or one of the causes of the loss, damage, or delay is not attributable to its fault or to the fault of any person referred to in article 18."

[317] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), p. 128.

applies to all the three categories of permissible deck cargo outlined in subparagraphs (a) to (c), with the abovementioned exceptions and stipulations.

This is not the case, however, with non-permissible deck carriage. Paragraph 3 of Article 25 contains a special provision for all other types of deck carriage that are not covered by the first paragraph:

> ***Article 25***
> ***Deck cargo on ships***
> *[…]*
> *3. If the goods have been carried on deck in cases other than those permitted pursuant to paragraph 1 of this article, the carrier is liable for loss of or damage to the goods or delay in their delivery that is exclusively caused by their carriage on deck, and is not entitled to the defences provided for in article 17.*

When the goods are carried on deck in non-permitted circumstances under the Rotterdam Rules, the carrier is liability and he cannot rely on any defences provided for in Article 17, when the loss of, damage to, or delay in the delivery of the deck cargo is exclusively caused by the carriage on deck. The phrase "exclusively caused" again refers to the special risks that are inherent in the carriage on deck (*i.e.* seawater and weather elements).[318] The exclusive causation also means that the carrier will lose his defences under Article 17 only when the non-permissible deck carriage is the sole reason for the loss, damage or delay in the delivery. Conversely, if, besides the non-permissible deck carriage, there is another cause for the loss, damage or delay in the delivery, then Article 17 will fully apply to the entire shipment regardless of Article 25.3. Moreover, the carrier retains his right to limit his liability under Article 59.

However, the carrier will further lose his right to limit liability if he carries goods on deck in breach of an express agreement with the shipper to carry the goods below deck, and the loss, damage or delay in delivery are caused by that carriage on deck:

> ***Article 25***
> ***Deck cargo on ships***
> *[…]*
> *5. If the carrier and shipper expressly agreed that the goods would be carried under deck, the carrier is not entitled to the benefit of the limitation of liability for any loss of, damage to or delay in the delivery of the goods to the extent that such loss, damage, or delay resulted from their carriage on deck.*

It can be assumed that, in this case, the carrier will also lose its right to rely on the defences in Article 17 since such non-permissible deck carriage falls outside the permitted categories of deck cargo, and is, thus, also struck by Article 25.3.

Article 25 also contains a rule in paragraph 4, which protects third party bill of lading holders:

> ***Article 25***

[318] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), p. 130.

> ***Deck cargo on ships***
>
> *[…]*
>
> *4. The carrier is not entitled to invoke subparagraph 1 (c) of this article against a third party that has acquired a negotiable transport document or a negotiable electronic transport record in good faith, unless the contract particulars state that the goods may be carried on deck.*

This rule enshrines the principle of "the informed consent" observed *supra* in the regulation of deck carriage under the Hague-Visby Rules – a party must know what he or she has agreed on in their contract. Accordingly, the permissible deck carriage in Article 25.1(c) of the Rotterdam Rules, and therefore the exception in Article 25.2, does not apply as between a carrier and a third party who acquired a negotiable transport document in good faith if the contract particulars do not state that the goods may be carried on deck. This means that the carriage in accordance with an express or implied agreement will become non-permissible and, as such, it will be subject to the same rules as those laid down in Article 25.3 described above. On the other hand, the word "may" in Article 25.3 refers to a liberty clause to carry on deck, meaning that no express statement or notice is required on the bill of lading that the goods will be carried on deck. A liberty clause inserted in the bill suffices for the carriage to be covered by Article 25.1(c), which allows the carrier to invoke the exclusion of liability under Article 25.2, provided that the specific conditions for that are met. Another important point derived from reading the wording of the provision is that paragraph 4 does not apply to non-negotiable bills of lading, meaning that a third party holder will be protected only under negotiable transport documents.

Considering Article 25.3 and 25.5, it is evident that the Rotterdam Rules do not apply the doctrine of fundamental breach or the doctrine of deviation.[319] However, some of the consequences of non-permissible deck carriage resemble those of a fundamental breach of the contract of carriage.

7.4 Assessment of the Rotterdam Rules' position on deck cargo

The law on deck cargo is one good example of an area of law that is handled in a superior manner under the Rotterdam Rules than under the Hague/Hague-Visby Rules, where it is not addressed at all. The new Convention regulates and accepts deck carriage as a permissible practice as long as it conforms to certain requirements, failing which there will be a breach of the contract of carriage. Article 25 of the Rotterdam Rules recognizes the advent of containerization and it also *"was welcomed as an appropriate apportionment of liability in conformity with the freedom of contract regime"*.[320] Probably the most important characteristic of the Rotterdam Rules' approach towards deck cargo is rendering an account of the containerization and of the subsequent technological transformation, which reduced the risks that pertain to deck carriage. What is more, the new Convention managed to efficiently distribute these risks between the parties to the

[319] Moreover, Article 24 on Deviation expressly excludes the of doctrine of deviation from the Rules: *"When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of this Convention, except to the extent provided in article 61."*.

[320] Working Group III (Transport Law), 10th session (Vienna 16-20 September 2002), para 79.

contract of carriage. If the Rotterdam Rules gain the worldwide support, it is likely that the current diversity of national rules related to deck cargo will be unified in an international regime.

Before leaving the problem of the Rotterdam Rules' position on deck cargo, consideration must be given to another observation. Historically, the rules governing on-deck carriage has been left outside the scope of the international regimes and instruments (*e.g.* the Hague-Visby Rules, Article I(c); York Rules 1864 and York-Antwerp Rules 1877 and 1890), which regulate maritime transport. As stated in the beginning of the chapter, this was done on purpose because such transportation has a very special nature and was accompanied by immense risks in the past. However, one can notice that regulating deck carriage has gradually been included in international conventions. The change is seen in several international agreements: the Hamburg Rules (Article 9), The Rotterdam Rules (Article 25), and The York-Antwerp Rules 1924, where "Rule I: Jettison of Cargo" has changed, omitting the description of deck stated previously therein: *"Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel."*

The table below will summarize the change with regard to deck cargo observed in the York/York-Antwerp Rules, which set maritime rules that codify the law of general average.[321] Rule I of these rules is dedicated to the Jettison of Deck Cargo, and it has undergone a significant transformation throughout the years.

	RULE I *JETTISON OF DECK CARGO*
York Rules 1864	*A jettison of timber or deals, or any other description of wood cargo, carried on the deck of a ship in pursuance of a general custom of the trade in which the ship is then engaged, shall be made good as general average in like manner as if such cargo had been jettisoned from below deck.* *No jettison of deck cargo other than timber or deals, or other wood cargo, so carried as aforesaid, shall be made good as general average.* *Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.*
York & Antwerp Rules 1877	*No jettison of deck cargo shall be made good as general average.* *Every structure not built in with the frame of the vessel shall be considered to be a part of the deck of the vessel.*
York-Antwerp Rules 1890	No change.
York-Antwerp Rules 1924	*No jettison of cargo shall be made good as general average, unless such cargo is carried in accordance with the recognized custom of the trade.*
York-Antwerp Rules 1950	No change.

[321] General average is a maritime principle, which applies when cargo must be jettisoned in order to save the vessel and/or the remainder of the cargo. It specifies that all parties involved in a common maritime adventure must proportionally share any losses that result from such sacrifice.

York-Antwerp Rules 1974	No change.
York-Antwerp Rules 1994	No change.
York-Antwerp Rules 2004	No change.

Table 1: Rule I on Jettison of Deck Cargo in the York/York-Antwerp Rules.

As evident, in the York Rules 1864, the rule initially excluded deck cargo from the scope of the instrument. There was, however, one exception, namely the carriage of wooden products on deck pursuant to a general custom within that trade. Later on, the York & Antwerp Rules 1877 amended the article so that deck carriage was excluded altogether from the rules on general average. The York-Antwerp Rules 1890 preserved the article unamended. However, the York-Antwerp Rules 1924 omitted the provision, defining "deck carriage", and modified the article so that cargo carried on deck *"in accordance with the recognized custom of the trade"* fell within the provisions of the Rules. No other change in that article was observed in the next four editions of the York-Antwerp Rules.

8. Conclusion

In this chapter it has been shown that the kernel of the obligations obligation of the carrier over deck cargo is mostly buried in the bill of lading and in the way courts interpret its terms in the context of the statutory regulations. For determining whether or not a carrier is liable for loss of or damage to cargo stowed and carried on deck, the starting point of reference is precisely the terms of the bills of lading as well as to what extent and how the bill evidences the terms of the contract of carriage. The latter is particularly important with regard to third-party B/L holders.

Although the current law on deck cargo is steadily departing from the traditional doctrine and although the old views on deck cargo are becoming increasingly inapplicable in certain trades, courts can still harshly punish carriers who, for example, have issued a clean bill of lading for the on-deck shipment of containers carried on a specially-built container vessel. Other courts, however, put more emphasis on the factual enquiry and take the stance that the nature of the cargo as well as *"technological innovation and vessel design may justify stowage other than below deck"*.[322]

Unfortunately, it was established that no uniformity could be found in the UK, the US, and under civil law when it comes to treatment of cargo stowed on deck. Perhaps the main culprit for having sets of rules on deck cargo which stem from the same Convention but which differ so much, is the lack of conceptualization of the terms "legal" and "illegal" deck cargo. Obviously, the standards whether cargo is authorized to be carried or deck or not vary quite substantially as some courts still tenaciously require any deck cargo to be specifically mentioned on the face of the bill of lading regardless of an established custom in the trade, while others apply a less restrictive approach and depart from the old doctrine of deck cargo. This lack of uniformity on the concept of legal/illegal deck cargo has resulted in courts interpreting differently the scheme established by Article I(c) of the Hague-Visby Rules and placing non-uniform burden on

[322] *The "Mormacvega"*, [1984] 1 Lloyd's Reports 296, at p. 300.

the carrier and on the cargo interests. Objective construction of the HVR leads to the observation that the Rules afford less protection to owners of deck cargo owners as opposed to owners of below-deck cargo, or even no protection, if such carriage and the pertaining risks have been communicated accordingly and the Rules have been excluded. Perhaps this is the reason why courts in some jurisdictions such as Belgium have taken the other extreme and overprotect cargo owners when deck carriage is involved. In practice, this non-uniformity in adjudication is translated into disputes with often unpredictable outcomes and solutions that are difficult to foresee by the parties. In legal terms, the various and differing approaches to deck cargo at national level deprave the Hague/Hague-Visby Rules regime of its essential purpose – to set up an equilibrium balancing the interests of the carrier and the shipper, which is uniform, easy to prognosticate, and capable of being applied to any situation.

This is another piece of evidence that leaving deck carriage outside the ambit of the Hague Rules may have been an appropriate approach a century ago but nowadays the lack of a uniform and harmonized statutory regulation for that type of carriage has become a disadvantage for the shipping industry. In that regard, the regulation of deck cargo under the Rotterdam Rules could turn into a good model of how this aspect of shipping law can be modernized.[323]

[323] DMF 2014, p. 69: *"Il serait temps d'unifier une fois pour toute le régime de la pontée. C'est à quoi tendent les Règles de Rotterdam (Art. 25) qui, à nouveau ouvrent le chemin de la modernité."* [It is time to unite, once and for all, all the regimes on deck cargo. This is what lies behind the Rotterdam Rules (Art. 25), which, again, opens the way to modernity.]

Chapter V
The Carrier's Obligations over Containerized Cargo

1. Introduction

The carriage of cargo in containers and the process of containerization take a special place in the world of shipping. Introduced in the second half of the XX century, shipping containers are an innovative and unique concept, both in technological and economic terms, which changed the entire transportation and distribution chain. Containerization, which commenced in 1960s and 1970s, is deemed to be as important a milestone for the shipping industry as the transition from sailing to steaming in the 1860s and 1870s.[1] As such, the carriage of goods in containers is an area which consists of numerous interesting legal problems which do not typically arise in other types of shipment, especially with regard to the obligations of the carrier over the cargo. This is mainly due to the fact that the whole transportation system became much more complex and more parties and actors were involved in the process of container carriage. Moreover, the legal issues that containers brought to the shipping industry are only in part addressed by international conventions and by national courts. Thus, containerization became another source of legal difficulties which have given rise to a demand for a uniform set of rules.

Since containers had an unparalleled impact on international trade, international relations, and social development, and because of the irreversible changes they brought to the modern world, the current chapter will aim at going beyond addressing the problems of the carrier's obligations over containerized cargo. Therefore, it will first provide background information on the advent, history, and development of containerized shipping (*section 2*). Then, it will familiarize the reader with certain technical parameters of the shipping container, such as size, dimensions, types, and use, as well as with the impressive vessels that carry thousands of metal boxes across the globe, and also with the pertaining infrastructure which has allowed the container revolution to actually come about (*section 3*). Being introduced to the technicalities of the carriage of containerized cargo, one will be more capable of grasping any intricacy or subtlety related to the carrier's obligations over goods shipped in the various container boxes that cross the oceans every day, every hour, and every minute.

From there, the discussion will focus on the problem of conceptualizing the container and whether it can be defined as a package for the purpose of the Hague Rules and the Hague-Visby Rules (*section 4*); followed by the carrier's period of responsibility

[1] Stephen Girvin – *'Carriage of Goods by Sea'*, 2nd edition (2007), p. 7.

over containerized shipments (*section 5*) as well as the obligations set in Article III rule 2 HVR (*properly and carefully load, handle, stow, etc.*) as applied to containerized cargo (*section 6*). The problem of weighing the containers as well as who owes that duty will be addressed in *section 7*. The regulation of containerized shipments under the Rotterdam Rules, and the impact on the carrier's obligations thereof, are finally considered in *section 8*.

2. The fascinating world of containers

2.1 History of the container revolution

This sub-section intentionally targets the container revolution, which took place in the second half of the 20th century, and not the history of containers, which dates back a long time ago. Indeed, the use of one or another form of containers can be traced all the way back to the Egyptians who used to load on their ships dry cargo packaged in straw baskets or liquid cargo stowed in amphoras.[2] Cargo handling methods later evolved into wooden crates, barrels and bags, depending on the goods to be carried, but efficiency was still impeded mostly by the lack of a better power source than manpower.[3] Up until the middle of the 20th century, loading and unloading goods was a very slow, expensive and labour-intensive process, which also had a negative impact on the cargo ship schedules.

As seen, the concept of grouping cargo into one receptacle was not new but it was the insight of one man to employ containers in a specific way, which revolutionized shipping. The nowadays concept of containerization as a system of intermodal freight transport carried out through the usage of shipping containers is mainly due to Malcom Purcell McLean (1913 - 2001), an American trucking entrepreneur from North Carolina.

The first ship to carry containers on board was the *SS Ideal X*, which sailed on 26 April 1956 from Port Newark, New Jersey to Houston, Texas, where there stood 58 trucks awaiting the shipment of trailers. This 5-day coastwise voyage was the first time when a ship was carrying containers on a scheduled trip (although she was also carrying 15,000tons of bulk petroleum), and it turned out to be a milestone in modern maritime history. The *Ideal X* was registered in the US and was flying the flag of the Pan-Atlantic Steamship Corp.[4] She was actually not a true container vessel but a T-2 tanker[5] built in 1945 in California. The ship was 524 feet (160 meters) long and had a capacity of 10,572 gross registered tons.[6] She was one of the T-2 tankers acquired by McLean in 1955 and refitted, the other vessel called *Amena*.[7]

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[2] Dr. Salvatore R. Mercogliano – *'The Container Revolution'*, Sea History 114, Spring 2006, at p. 8.
[3] Dr. Salvatore R. Mercogliano – *'The Container Revolution'*, Sea History 114, Spring 2006, at p. 8. (*ibid.*)
[4] By that time McLean had acquired the Pan-American Steamship Corp. out of Mobile, Alabama, a subsidiary of Waterman Steamship. To do that, McLean had sold his shares in McLean Trucking. Several months after the acquisition of Pan-Atlantic, McLean bought also Waterman.
[5] Under the Merchant Marine Act of 1936, the then newly-established US Maritime Commission distinguished between nine categories of vessels, each of them designated with a specific code letter such as "P" for passenger ships, "B" for barges, and "L" for bulk carriers engaged in the trade in the Great Lakes. Two categories were involved in the early carriage of containers – "T" for tankers and "C" for oceangoing cargo ships. The numbers after the letter ran from 1 to 4 and indicated the size of the vessel as the higher the number, the bigger the vessel.
[6] Before the advent of containerization, seagoing vessels were mainly measured by size, volume, and weight. Gross registered tonnage and net registered tonnage are a measurement of volume (one register ton is equal

McLean ordered the construction of an additional and temporary, so called, spar deck[8] above the existing weather deck (a technique known as *"Mechano"* decking), to which 58 brand-new trailers were fastened.[9] Although by that time these were generally called "trailers", they were in essence 58 reinforced half-truck-size containers.[10] They were directly secured to the spar deck and were not stowed on top of one another.[11] It must be underlined that McLean was not the first to envisage loading cargo-carrying vehicles on a ship. He was using a concept that was developed by Seatrain Lines in 1929 when the founder of Seatrain Lines and a World War I aviator, Graham M. Brush, started offering a service of carrying up to 100 railcars on both the lower and the main deck of the ocean vessel, which were equipped with parallel rail tracks that allowed the railcars to be stowed with their wheels and running gear attached.[12] Moreover, a concept similar to McLean's was employed by the US military during World War II – namely to convert a tanker to carry, across the North Atlantic to Europe, not only fuel but also various large and bulky cargo on the weather deck.[13]

Although Malcom McLean did not start from scratch as the concept of carrying trailer trucks was not genuinely his, McLean's initial idea differed substantially to those early attempts to revolutionize sea carriage. He intended to put not the entire trailer trucks on board the ship but only the trailers themselves. However commercially viable the roll-on/roll-off service seemed to be, McLean soon realized that too much cargo space would be lost because of the wheels and undercarriage of the truck trailers; the so called "broken stowage". Therefore, McLean transformed this concept into an even more radical idea of loading on board the *Ideal X* only the containers, leaving the detachable running gear of the trailer behind. After the sea journey the containers would be reattached to a different chassis once the ship was to reach the port of destination six days later. The

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to 100 cubic feet or 2.83m^3). The former designates the total enclosed space or internal capacity of a vessel, including all spaces below the upper deck as well as permanently closed-in spaces on the deck. The latter measures the earning power of the vessel when carrying cargo. That is, net tonnage is equal to the gross tonnage minus the volume of such spaces that have no earning capacity or room for cargo (*e.g.* fuel compartments, engine room, crew's quarter, bridge). On the other hand, displacement tonnage and deadweight tonnage are a measurement of weight. The first one designates the actual weight which a vessel displaces when floating at any given draft such as "light" (includes fuel and supplies but no cargo) or "loaded" (includes fuel, supplies, and cargo). The deadweight tonnage (DWT) measures the carrying capacity of the vessel figured by weight. Thus, the DWT is the difference between "displacement loaded" and "displacement light". However, with the introduction of the fully cellular container vessels, the carrying capacity of such ships started being designated with the number of containers (TEUs) that the ship can carry.

[7] McLean took advantage of a US post-war programme, through which the government was selling cheaply World War II tankers to promote the maritime industry. Although the programme was targeting traditional shipping lines, and not starters such as McLean's Pam-Atlantic, he managed to break through. See: Marc Levinson – *'The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger'*, Princeton University Press (2006), pp. 47-48, fn. 22

[8] A light deck fitted over the upper deck

[9] Brian J. Cudahy – *'Box Boats: How Container Ships Changed the World'*, Fordham University Press, New York (2006), p. xi.

[10] Robert Mottley – *'McLean: A retrospective'*, American Shipper: The Monthly Journal of International Logistics, April 2006, at pp. 8-25, at p. 16.

[11] Brian J. Cudahy – *'Box Boats: How Container Ships Changed the World'*, Fordham University Press, New York (2006), pp. 29-30.

[12] Robert Mottley – *'McLean: A retrospective'*, American Shipper: The Monthly Journal of International Logistics, April 2006, at pp. 8-25, at p. 10.

[13] Brian J. Cudahy – *'Box Boats: How Container Ships Changed the World'*, Fordham University Press, New York (2006), p. 23.

containers were hoisted by cranes, loaded on, and then unloaded from the weather deck of the vessel. Thus, through this unconventional and creative idea, Malcom McLean indeed managed to *think outside the box*, both literally and metaphorically.

McLean became a pioneer in this specific and novel method of transport that was employed for the first time on his *Ideal-X*, a tanker refitted with a cargo deck. The containers carried on the spar deck of McLean's vessel were custom built and were 33 feet long, a size which is not common nowadays. The cost savings were evident from the very beginning. McLean employees calculated that the price for loading cargo dropped from $5.83 per ton, which were the 1956 figures for loading loose cargo on an average-size vessel, to only $0.16 per ton for the cargo loaded on the *Ideal-X*.[14]

McLean, however, did not stop there as he wanted to acquire a ship that was capable of carrying containers only, unlike the T-2 tankers, which were suited for carriage of fuel in the tanks and of not more than 58 containers on the specifically-built spar deck. He picked six war-time C-2 general cargo vessels and converted them into fully operational container vessels, the first one having the name *Gateway City*.[15] Vertical steel rails were attached into the holds and containers were now able to be placed on top of the other – this was the beginning of what later came to be the cellular containership. Hatch covers were also renewed so that containers could be stacked on top of the hatch covers, as deck cargo, and not only in the holds. In terms of capacity, the result was astounding – *Gateway City* was capable of carrying 226 containers, which is a fourfold increase, compared to *Ideal X*. Furthermore, unlike the *Ideal X*, the *Gateway City* was equipped with two movable gantry cranes on-board, which made the new container vessel completely independent on the port infrastructure. In general, the design of these renovated C-2 vessels was very innovative as it was not based on any previous naval architecture.[16] The new vessels outmatched in any way previous general cargo ships. While a conventional break-bulk carrier required the engagement of over 150 stevedores for four full day, it was estimated that it would take only 14 stevedores and a single eight-hour shift to unload and load full cargo on the *Gateway City*.[17] Moreover, the containers protected the goods from pilferage and provided for less shifting of the cargo in an event of a stormy weather. With all those advantages at hand, the first fully-cellular container line began regular operation in 1957.[18]

In 1960, McLean dropped the Pan-Atlantic name and logo and his intermodal company was renamed into Sea-Land Service Inc., which is deemed to be a better representation of the company's operations. In 1966, ten years after the maiden voyage of *Ideal-X*, the first international containership voyage took place and it was undertaken

[14] Marc Levinson – *'The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger'*, Princeton University Press (2006), p. 52.
[15] Brian J. Cudahy – *'Box Boats: How Container Ships Changed the World'*, Fordham University Press, New York (2006), pp. 32-33.
[16] Brian J. Cudahy – *'Box Boats: How Container Ships Changed the World'*, Fordham University Press, New York (2006), p. 33.
[17] Brian J. Cudahy – *'Box Boats: How Container Ships Changed the World'*, Fordham University Press, New York (2006), p. 35.
[18] Robert Mottley – *'McLean: A retrospective'*, American Shipper: The Monthly Journal of International Logistics, April 2006, at pp. 8-25, at p. 16.

by a vessel owned by McLean's Sea-Land. The *Fairland* sailed from Port Elizabeth, USA to Rotterdam, the Netherlands, with 236 containers on board.[19]

In early 1970s, or about ten years after the company was established, Sea-Land made a decision to abandon the method of loading and unloading the containers via hoisting them above the ship through on-board cranes, but instead decided to rely entirely on shoreside cranes in order to save precious deck space on board the vessel and in order to ensure a more efficient and faster loading and discharging operations, which the latter was more capable of in comparison with on-board cranes.[20] Container ships that have on-board cranes are generally called "geared", while those that do not have cranes are classified as "gearless". Evidently, already in the dawn of containerization there were indications that container shipping would advance and progress, and Sea-Land's decision to some extent marked the beginning of a process of building bigger and bigger vessels with increasing TEU capacity.[21] Nowadays, SeaLand Service is part of the biggest container operator in the world – Maersk Lines (a daughter company of the A.P. Moeller Group).

McLean's concept of moving freight was not adopted quickly. The advantages of the containerization were not widely seen up until the Vietnam War, which proved the valuable assets achieved through this system. In 1966, the US military contracted with McLean's company to ship military equipment first from the USA to Bordeaux, France, and Hamburg, Germany, and then from the USA to Vietnam. The efficiency of containerships and containerized cargo then emerged. By the end of the war (1973) about 80% of all cargo shipped throughout the Vietnam War was transported in containers.[22]

It suffices to say that Malcom McLean is the inventor of the shipping container as we know it today, and that he was the driving force behind the container revolution, which changed the entire system of transportation. It is submitted that McLean's biggest contribution was his managerial insight that the true business of transport companies was to move freight rather than to operate seagoing vessels or road or rail cars.[23] McLean's merits are probably best summarized by Charles R. Cushing (a naval architect whom McLean hired in 1961 as a mechanical engineer at Sea-Land), when he delivered one of the eulogies at McLean's memorial service on May 30, 2001: *"McLean revolutionized and sped up the entire transportation chain and reduced its cost, so that people throughout the entire world are now able to bring their handiwork to the global markets. The result has been a steady and identifiable increase in the standard of living in the developing countries and elsewhere throughout the world."*[24]

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[19] Source: the World Shipping Council, http://www.worldshipping.org/about-the-industry/history-of-containerization/industry-globalization.

[20] Brian J. Cudahy – *'Box Boats: How Container Ships Changed the World'*, Fordham University Press, New York (2006), p. 94.

[21] See: *section 3.2* below.

[22] Dr. Salvatore R. Mercogliano – *'The Container Revolution'*, Sea History 114, Spring 2006, at p. 10.

[23] Marc Levinson – *'The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger'*, Princeton University Press (2006), p. xi.

[24] Charles R. Cushing – *'Eulogy for Malcom McLean'*, May 30, 2001; unpublished paper in the holdings of the McLean Foundation, Alexandria, Va., partially cited in Brian J. Cudahy – *'Box Boats: How Container Ships Changed the* World' at p. 205 and in Robert Mottley – *'McLean: A retrospective'*, American Shipper: The Monthly Journal of International Logistics, April 2006, pp. 8-25.

2.2 Impact on the world economy

Although the thesis is centered around the carrier's cargo-related obligations prescribed by the Hague-Visby Rules and, thus, the topic of multimodalism is beyond the scope of the current research (the latter being restricted to the sea leg of the journey), it should be noted that the true effect of containerized carriage is attained to the fullest extent when the carriage starts from the point where goods are manufactured and ends where the warehouse of the receiver is, namely when the carriage is on a door-to-door basis. This is achieved indeed through a combination of sea carriage and road, railroad, and/or air carriage. That is why, when considering in this section how containers have affected the world around us, one must take into account that the substantial socio-economic changes brought should be regarded from the perspective of multimodalism.

Since the carriage of goods has always been an activity with critical socio-economic importance, a revolutionary modification of the transportation process such as the introduction of containers will inevitably play a fundamental role in many commercial, industrial, and social processes as well.[25] Thus, the impact of containers on the world economy is not confined simply within a product's final cost but has had far-reaching consequences.

The reason why the process of containerization is commonly referred to as the container revolution is that, by becoming the dominant method of transportation, the shipping container had a thorough impact on the evolution of ship design, on the size and location of ports around the world as well as on the relationship and integrity of various modes of transport. Containerization also reached that far as to affect production processes and distribution and supply chains.

To answer whether the increase of world trade backed the advent of containers or whether it was the other way around is like answering the centuries-old riddle about what comes first, the chicken or the egg. Similarly, it is difficult to say whether containerization brought manufacturing from North America to Asia, or whether this shift was merely facilitated by container shipping. It is a fact, however, that after the end of World War II international commerce rose significantly and authors see that growth as a result of the globalization processes, the enhanced methods of production such as mechanization as well as a result of improved management of the production lines.[26] It is fair to say that containerization, on the one hand, and globalization, on the other, share a reciprocal relationship, and neither of them has occurred irrespective of other factors at the time. Some research even suggest that the advent of containerized transport has given a bigger boost to globalization than all the trade agreements signed internationally in the second half of the 20th century.[27]

All things considered, there are a few distinctive changes that containerization brought about in present-day world economy.

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[25] Alessandro Olivo, Massimo Di Francesco, Roberto Devoto – *'Intermodal freight transportation. The problem of empty containers in transportation service production'*, European Transport/Trasporti Europei, IX (2003) 24, pp. 49-53, at p. 49.
[26] Dr. Salvatore R. Mercogliano – *'The Container Revolution'*, Sea History 114, Spring 2006, at p. 8.
[27] The Economist – *'The Humble Hero: Containers have been more important for globalisation than freer trade'*, May 18, 2013.

First of all, the highly-automated system of intermodal shipping containers made transportation so cheap that the world could afford distribution chains bringing commodities from all around the world into even the remotest places. This was not viable prior to the advent of containerization. Therefore, what makes the container so special is not the aluminum or steel box itself but the utility it brings.

Secondly, containers changed forever how and where goods are manufactured. As a result, the process of containerization caused vast changes on the labour market. Not only did a lot of longshoremen lose their job, but many workers involved in various manufacturing processes and in wholesale also suffered a job loss as the marine geography and the economic geography changed. This process emerged because many jobs had been previously highly dependent on the presence of a nearby port. And ports that did not make the necessary investments to respond to the advent of containerization slowly started to declined and lose importance.[28] After the container revolution made freight so cheap, manufacturers no longer needed to have their production close to their customers in big population centers and thus accrue substantial costs. On the contrary, manufacturing processes moved to smaller towns, not necessarily close to a port, where they could benefit from lower costs for wages and land.[29]

Thirdly, the cheap freight induced by containerization, and the fact that the physical proximity to suppliers and customer was no longer an advantage, made many domestic companies reach the world markets and become international companies.[30] Thus, the container revolution boosted world trade and the economy in general. Companies were now able to reach undeveloped areas that had previously been considered too remote to be affected by and involved in world trade. Thus, trade between nations simply increased and became more integrated, and this trade was progressively taking place by means of containers. All these processes come back and they, in itself, are a factor for expanding the container industry and explain containerization has never stopped growing. It won't be far-fetched to conclude that world trade and container transport coexist in a symbiosis.

In the fourth place, containerization managed to integrate East Asia into the world economy and as a result the North Atlantic was no longer the only place trade was concentrated. What is more, although shipping of containers kicked off in the US, this industry later began to be dominated by European and Asian operators. Shipowners flying under the US flag faced incremental problems of local protected markets and the overregulation of the sector, which barred them from competing worldwide in this fast-changing industry.[31]

Finally, although no one in the early days expected to see it, containers have become a major threat not only to the process of shipping as a whole but also to national

[28] Examples of cities which declined as a centre of maritime commerce are New York (US) and Liverpool (UK). Examples of an opposite development are Los Angeles (US), Hong Kong (PRC), Rotterdam (NL), and Singapore, which turned into huge transportation hubs.
[29] Marc Levinson – *'The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger'*, Princeton University Press (2006), p. 2.
[30] Marc Levinson – *'The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger'*, Princeton University Press (2006), p. 3.
[31] Marc Levinson – *'The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger'*, Princeton University Press (2006), p. xiii.

security. While the metal boxes afford significant security for the cargo as regards theft and damage, their overall security is, on the other hand, undermined by the possibility that containers may be used by terrorists as a tool to implement large-scale attacks by concealing, for example, a "dirty bomb", a biological or a radiological weapon inside a container, which would have devastating consequences.[32]

Apart from these visible and tremendous changes that the introduction of containers brought to the world economy, to the distribution chains, and to the shipping industry, in particular, there is one less conspicuous transformation which seems to be overlooked. One of the most important contributory features of containers is obviously that they have sustainably diminished cargo damage by unitizing and grouping the goods into one steel or aluminium box.[33] Thus, by affording more protection to the cargo owners, containers have silently changed the balance between carrier interests, on the one hand, and cargo interests, on the other. Needless to say, this balance is the foundation of the Hague-Visby Rules, which, like the Rotterdam Rules and like any other international convention, is a product of an international compromise. Therefore, without anyone anticipating, the cargo interests, being traditionally the weaker party, are no longer in need of the same statutory protection as envisaged by the drafters of the Rules in 1924. In other words, the configuration between the interests of the parties has been changed and the current law does not always reflect its current state. It is precisely this less apparent point, namely the modified foundation of the Rules brought by containerization, which is the root of all legal problems discussed later in this chapter.

2.3 Containerization today

Containerized shipments have risen dramatically since the metal boxes were first introduced to the world of shipping in the late 1950s.[34] In the same time, concentration on the liner market has also significantly increased as shipping companies tend to operate bigger and bigger container vessels and also to offer combined service in order to answer the transport needs of an ever globalized world.[35] Higher concentration means a small number of companies controlling a bigger share of the product and geographical market, which, in essence, means an oligopolistic market. Actually, the construction of bigger container vessels contributes to the process of concentration on the liner market. The reason is that larger ships are capital intensive and can hardly be afforded by smaller shipping companies because of the substantial sunk costs associated with the

[32] Michael D. Greenberg, Peter Chalk, Henri W. Willis, Ivan Khilko, David S. Ortiz – *'Maritime Terrorism: Risk and Liability'*, published by RAND Corporation (2006), Chapter 7: Risks of Maritime Terrorism Attacks Against Container Shipping, pp. 111-132.

[33] However, note that it is often remarked that, by means of containerization, the problems associated with cargo damage have merely been shifted from one big container (being the vessel) to numerous smaller ones. See UK P&I – *"Container matters: The container revolution of the 1960s was deemed to be the solution to limiting cargo damage, but has experience proved otherwise?"*, a supplement to LP News 13, published in September 2000.

[34] Only for the period 1996-2014, the global containerized trade has grown from 50 million TEUs to over 160 million TEUs per year, meaning that for nearly two decades the containers shipped throughout the world have increased with the staggering 220%. Source: UNCTAD – *Review of Maritime Transport 2014*, p. 17.

[35] Meifeng Luo, Lixian Fan and Wesley W. Wilson – *'Firm growth and market concentration in liner shipping'*, Journal of Transport Economics and Policy (JTEP), Volume 48, Number 1, 1 January 2014, pp. 171-187, at p. 172.

construction of such a vessel.[36] It is no accident that the CEO of Maersk, the largest container operator, has predicted that the domination of the big companies on the market will make competition almost impossible for small and mid-size container shipping companies (operators controlling 3 to 5% market share), also in the light of the overcapacity of TEUs available, which was further fostered by the construction of ultra large container vessels.[37]

Nowadays, the entire global economy is dependent on the swift and efficient exchange of goods. And the system of intermodal shipping has turned into a crucial element of today's international trade. Almost any goods as well as bulk and liquid cargo are capable of being transported in a container. That is why containers represent today the biggest and the most quickly growing category of cargo transport at most ports worldwide.[38]

Containerization represents not just an innovative product but an entirely new system with numerous advantages such as: its speed and predictability, because containers reduce the time in which a ship stays in port; its economy of scales; and its ability to reach virtually the remotest places, because a container is optimized to be carried by any component of the transportation network.[39] Furthermore, containers reduce the possibility of pilferage and provide better security for the cargo. They also provide better protection for the cargo from the weather and atmospheric conditions, and reduce the physical handling of the cargo during loading and unloading. In that sense, containers protect also the goods from damage that may occur during handling operations at the port. These major factors turned the shipping container into a vital element of today's world economy.

The essence of containers is that they allow cargo to be transported to remote areas at minimum costs, thus shrinking today's world and in the same time expanding human choice. Shipping costs have nowadays indeed shrunk dramatically because of the introduction of containers. For example, the costs for shipping a full 40-foot container from China to the United States in 2006 were estimated to be as low as $2,000.[40] Shippers may benefit from even lower freight rates, when carriers try to avoid unprofitable movement of empty containers and are thus willing to offer enticing prices as long as reallocation of empty containers is prevented.[41] This stems from the fact that commerce and the resulting traffic of containers is rarely balanced, which exposes carriers to risks associated with the movement of empty containers – a process that

[36] Meifeng Luo, Lixian Fan and Wesley W. Wilson – *'Firm growth and market concentration in liner shipping'*, Journal of Transport Economics and Policy (JTEP), Volume 48, Number 1, 1 January 2014, pp. 171-187, at p. 172. (*ibid.*)
[37] The Wall Street Journal – *'Maersk CEO Predicts Big Squeeze for Small Container-Ship Operators'*, June 5, 2013.
[38] Prem Nath Dhar – *'Global Cargo Management: Concept, Typology, Law and Policy'*, Kanishka Publishers, Distributors (2008), p. 1.
[39] Capt. R.E. Thomas – *'Thomas' Stowage'*, 2nd edition (1985), p. 51.
[40] Christian Caryl – *'The Box is King'*, Newsweek International, April 10, 2006.
[41] Alessandro Olivo, Massimo Di Francesco, Roberto Devoto – *'Intermodal freight transportation. The problem of empty containers in transportation service production'*, European Transport/Trasporti Europei, IX (2003) 24, pp. 49-53, at p. 49.

generates only costs and no income. It has been estimated that about 20% of the world container throughput consists of empty containers.[42]

At the same time, the container industry is not static. As it will be observed below, the constant innovation in containers and container vessels keeps that sector of the shipping industry developing. This is fostered by the growth of world trade – it is estimated that by 2020 the global container traffic will reach 371 million TEU.[43] There is one distinctive route, through which containerized trade flows and this is the East-West route, where the biggest economies of scale can be achieved. It is estimated that about 85% of the containers carried around the world are transported along that route, and those vessels do not even enter the Southern hemisphere while circumnavigating the planet.[44] Conversely, the trade lanes along the less voluminous North-South route serve ports situated in developing countries as well as small island developing states (SIDS), which can hardly afford investing in the port infrastructure that is necessary to support the bigger container vessels.[45]

With the introduction of a new transportation system, and with the commissioning of construction of ever larger vessels, new shipping perils appear on the horizon. Although the number of claims is reported to have shrunk in the recent years, the ever growing capacity of container vessels poses inherent threats.[46] One of them is the increasing value of the cargo carried on a single vessel. Today's container vessel is capable of carrying cargo worth of nearly $1 billion.[47] Therefore, a possible disaster leading to loss of a fully laden container vessel with all her cargo could expose cargo insurers, as well as P&I insurers, to claims for a staggering amount.

3. Technical parameters

This section deals with the technical aspects of container transport, in particular the technicalities associated with size, structure and type of shipping containers and the vessels that carry them as well as the infrastructure that supports the whole process. To begin with, when talking about container ships, one must take into account that there is a vast array of vessels designed to carry containers as well as a vast array of container types.

3.1 Containers – size, dimensions, design, and types

3.1.1 Size and dimensions

Containers, also referred to as shipping containers, standard ISO containers (isotainers), intermodal containers, cargo containers, Connex boxes, or less formally known simply as "boxes", are typically expressed as TEU, which stands for a "trailer equivalent unit" or a "twenty-foot equivalent unit", and designates a trailer that is 20

[42] Mark Garrett (editor) – *'Encyclopedia of Transportation: Social Science and Policy'*, SAGE Publications, Inc. (2014), Volume 1, p. 412.
[43] Tom Schox – *'Containing a Problem'*, Maritime Risk International, Vol. 28, Issue 9, 2014, pp. 16-17.
[44] UNCTAD – *Review of Maritime Transport 2014*, p. xiii.
[45] UNCTAD – *Review of Maritime Transport 2014*, p. 71.
[46] Tom Schox – *'Containing a Problem'*, Maritime Risk International, Vol. 28, Issue 9, 2014, pp. 16-17 (*ibid.*).
[47] Tom Schox – *'Containing a Problem'*, Maritime Risk International, Vol. 28, Issue 9, 2014, pp. 16-17 (*ibid.*).

feet long (6.1 meters), has a cubic capacity of approximately 33 cubic meters, and a carrying capacity of about 28 metric tons.[48] But setting standardized size and dimensions, however, was not an easy task.

Already in the early years of container shipping, there were serious obstacles, one of them being the lack of standardization.[49] Various companies used containers with different size. For example, Matson Navigation Company on the US West Coast used 24-foot containers, while McLean's new company Sea-Land used 35-foot containers. In Europe, on the other hand, containers represented a wooden crate reinforced with steel.[50] Since containers differed so much, they couldn't be interchangeable and the true effect of containerization could not be revealed.

In the late 1950s, the American Standards Association (ASA)[51] and the International Organization for Standardization (ISO) began working towards achieving uniformity in container specifications. Since there was no consensus on which standard should be applied internationally, a considerable amount of time and effort were needed before an informal international agreement was reached in 1967 and the standardized ISO container was adopted.[52] With regard to size, decimal-based guidelines emerged, which means that containers could have length that is divisible by ten (*e.g.* 10 feet, 20 feet, 30 feet), whereas the maximum length was 40 feet.[53] The other dimensions of the shipping container were also standardized, namely the width was 8 feet (2.44 meters), while the height of a standard ISO container was originally set to be 8 feet as well, largely in order to suit most of the railway tunnels. The current standard for a container's height is, however, 8.6 feet (2.59 meters).[54] Thus, the dimensions of a TEU are set at 20' x 8' x 8.6', and of the FEU at 40' x 8' x 8.6'.

Further agreement was reached that two 20-foot containers placed one next to each other end-to-end would have exactly the same length as one 40-foot container. Similarly, any refrigeration equipment of a refrigerated container (reefer) should not be protruding with the effect that the original dimensions of the container are preserved.[55] Since 1961, when ISO set uniform standards for all shipping containers, the industry practice has shown preference towards the 20-foot (TEU) and 40-foot containers (FEU), whereas 10-foot and 30-foot containers did not gain popularity. The TEU is so commonly used that it has nowadays become a standard reference for measurement of volume of cargo or ship capacity. Today, there are still non-standardized containers in use,

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[48] Prem Nath Dhar – *'Global Cargo Management: Concept, Typology, Law and Policy'*, Kanishka Publishers, Distributors (2008), p.2

[49] The development of containerized trade created the necessity of establishing international standards for container safety. In 1972, the Convention for Safe Containers (CSC) was adopted, which entered into force in 1977.

[50] Marc Levinson – *'The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger'*, Princeton University Press (2006), p. 127.

[51] After 1966, this non-profit organization was reorganized and renamed into American National Standards Institute (ANSI).

[52] W. David Angus – *'Legal Implications of "The Container Revolution" in International Carriage of Goods'*, McGill Law Journal (1968), Vol. 14, No.3, pp. 395-429, at p. 415.

[53] Brian J. Cudahy – *'Box Boats: How Container Ships Changed the World'*, Fordham University Press, New York (2006), p. 40.

[54] The arrival of hi-cube containers raised the height to 9.6 feet (2.90 meters).

[55] Brian J. Cudahy – *'Box Boats: How Container Ships Changed the World'*, Fordham University Press, New York (2006), p. 40.

although rarely, such as the 48-foot and the 53-foot container as well as other non-decimal lengths.

Industry-wide standards were introduced not only with regard to size and dimensions but also with regard to the strength of the shipping container so that containers can be stacked on top of one another. Also, they had to be able to endure not only sea voyages but also road and railway voyages (where the exerted forces exerted higher) and that is why the end wall of the container had to be stronger.

3.1.2 Anatomy of a container

Shipping containers are usually made of aluminium or steel and each container is manufactured according to the ISO specifications and requirements, regardless of the country of manufacture.[56] Therefore, the life of every container starts as a big role of steel, which is then unrolled and cut into sheets that are subsequently corrugated. A single container has a rectangular shape and consists of numerous components which add up to the structural rigidness. A standard shipping container weighs about two tons and has a maximum payload of about 22 tons, which means that the maximum gross weight (the tare weight of the container plus the weight of the cargo) is about 24 tons.[57] The average lifespan of a container, during which it can effectively be used in shipping, is between 12 and 15 years as about 10% of the containers worldwide are repaired every year.[58]

A standard dry cargo TEU is made up of a roof, two sidewalls, an end-wall, a floor, cross members, top rails and bottom rails, corner posts, corner castings, and a door assembly. The roof, the two sidewall panels, and the end-wall panel of the container are all made of corrugated aluminum or of corrugated Corten steel sheets, both of which have a high thermal conductivity. That results in the temperatures inside the container raising too much in the warm seasons or plummeting sharply in the cold seasons. The corrugated profile of the sheets ensures added strength and rigidity, while the Corten type of steel, known also as weathering steel, is corrosion-resistant and provides protection against the damaging effect of the salty seawater. Standard general-purpose containers have vents on one or both ends, which are in essence openings that provide ventilation.[59]

The floor is made of a solid underlying frame and bottom cross members – they are the structural components which serve as a support for the container floor, and which have forklift pockets that allow a container to be lifted and carried by a forklift truck. The cross members, known also as floor supports, are covered by laminated flooring of marine plywood, which has durable properties in humid and wet conditions

[56] Although containerization was born in the USA, the first shipping containers were manufactured by Japan and Europe. Later on, production of containers embraced also South Korea, Honk Kong, and Taiwan. After China entered into the industry of container production in 1980, it has steadily increased its market share as nowadays the country has become the world's largest manufacturer of ISO containers with a share of over 80%. Source: ISBU Association, http://www.isbu-info.org/all_about_shipping_containers_industry.htm.

[57] These figures differ per container type. For example, the gross container weight of a FEU and of a 20-foot flat-rack container is about 30 tons. See: William V. Packard – *'Cargoes'*, 2nd edition (2005), p. 32.

[58] European Commission (Customs 2002 Programme) – *'Good Practice Guide for Sea Container Control'*, Chapter 1: General Approach to Container Control, p. 15.

[59] German Insurance Association (GDV) – *'Container Handbook'* (2012), section 3.1.1.1 Container design and types.

and is resistant to delaminating and fungal attack. The floor of a container is the weight-bearing element, and it must be strong enough to withstand the weight of the cargo inside the container, especially when the container is being lifted. Almost any container has securing points in the floor as well as on the wools so that cargo can be accordingly fastened and secured inside the container.[60]

The top and bottom rails,[61] the corner posts as well as the frames enclosing the front end and the rear end (where the door assembly is mounted), form the integral frame of the container. These are the load-carrying elements of the container, particularly when it comes to external load.[62] In other words, the design of a shipping container provides strength to the frame of the container, which is the element that preserves the structural integrity, and not to the side walls.[63] Thus, it is the steel framework of a container and the vertical corner posts that allow several heavy containers to be stowed one atop the other, without the lower containers being smashed. The corner posts ensure that the weight of upper containers is distributed between the four corners of the container and, hence, no pressure is exerted on the top wall of the container.

Another critical part of a container's design is the corner castings.[64] They are located at all the eight corners, and their main function is to allow a container to be handled by a gantry crane, which attaches to the corner castings in order to lift the container. Corner castings play also an important role in stacking containers and attaching them to the deck of a seagoing vessel or to one another. This is done by means of twist locks which secure, for example, the top corner castings of one container to the floor corner castings of another container.

The door assembly of a standard shipping container is attached to the rear-end frame by means of four or five hinges per door, and it is locked by means of four locking bars (lock rods). As containers are always stowed longitudinally on a container vessel, the door assembly is facing rearwards. Both the right-hand door and the left-hand door must be able to open to 180 degrees. Each door has two lock rods, and the sequence of opening is first the right-hand door, and then the left-hand door. On the left-hand door of every container there is a Safety Approval Plate (CSC plate) mounted, which is required by the Convention for Safe Containers.[65] Every single shipping container must have this CSC plate installed, also known as a consolidated data plate, which serves as a passport of the container. The plate must include the following information in English or in French language:

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[60] Capt. R.E. Thomas – *'Thomas' Stowage'*, 2nd edition (1985), p. 52.
[61] The top rails are also known as headers while the bottom rails are sometimes referred to as sills.
[62] That is why, while one FEU is allowed to be stowed on two TEUs, two 20-foot containers should never be stowed on top of a 40-foot container unless there is a frame or platform which can support the weight of the two 20-foot containers. Otherwise, the top of the FEU, not being a load-carrying element of the container's design, would collapse under the weight of the two TEUs.
[63] Capt. R.E. Thomas – *'Thomas' Stowage'*, 2nd edition (1985), p. 52.
[64] This is the widely-used term for the elements located in the corners of a container, although they do not need to be installed through a process of casting.
[65] The Convention for Safe Containers (CSC), 1972 was developed and drafted by the International Maritime Organization. Its latest amendment (IMO Resolution MSC.355(92) adopted at London on 21 June 2013) entered into force on July 1, 2014. The Convention ensures that shipping containers that operate worldwide are subject to the same set of safety regulations.

- *"CSC SAFETY APPROVAL"*
- *Country of approval and approval reference*
- *Date (month and year) of manufacture*
- *Manufacturer's identification number of the container or, in the case of existing containers for which that number is unknown, the number allotted by the Administration*[66]
- *Maximum operating gross weight (kilograms and lbs.)*
- *Allowable stacking weight for 1.8 g (kilograms and lbs.)*
- *Transverse racking test load value (kilograms and lbs.).*[67]

The approval reference on the CSC plate certifies that the container is designed and built according to the ISO requirements for dimensions and strength, and that it has been regularly maintained and is in a condition to be transported on board a seagoing vessel. Furthermore, the identification number is given to each and every container that is involved in commercial shipping. This is a unique unit number, known also as a box number, and it serves as a serial number of the container and allows to be established who the manufacturer of the container is, who is using it as well as where the container is located around the world at any given point of time.[68] A shipping container's identification number always starts with a 4-letter prefix which usually ends up with a U, followed by a seven-digit number [XXX-U-123456-1]. The first three letters indicate the owner of the container, the forth letter indicates the product group,[69] whereas the first six digits signify the serial number and the last digit is the check digit, which is derived by a mathematical formula.[70] Every identification number is unique in the sense that no two containers can have the same number.

3.1.3 Types of containers

Containers come in a variety of forms, shapes and uses.[71] The type of container employed in a given shipment mainly depends on the type of the products being carried or the special services that they need, or on the method of stuffing and handling of the container. Below, examples will be given of the most popular designs of shipping containers. An important characteristic is that almost all types of containers, regardless of the structural differences, share the same ISO-standardized external length, width and height.[72] However, not all types of container are suitable to form part of a container stow on a vessel.[73]

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[66] Prior to the 2014 amendment of the CSC, the identification number showed the owner of the container.
[67] Convention for Safe Containers (CSC), 1972, Annex I, Regulations for the Testing, Inspection, Approval and Maintenance of Containers, Regulation 1, paragraph 2, item (a).
[68] Source: the World Shipping Council, http://www.worldshipping.org/about-the-industry/containers.
[69] In this case, U stands for a "freight container" and is to be found on all freight containers. The letter J stands for detachable freight container-related equipment, while Z indicates trailers and chassis.
[70] German Insurance Association (GDV) – *'Container Handbook'* (2012), section 3.3 Identification system.
[71] For a detailed technical specification about the different types of containers, see: European Commission (Customs 2002 Programme) – *'Good Practice Guide for Sea Container Control'*, Chapter 3: Container Specifications.
[72] An exception is the half height shipping container, which is half the height of a standard dry cargo container, namely 4.3 feet. These containers are used primarily for heavy cargo per cubic meter such as coal or stones. Another exception is the high-cube container, which is 9.6 feet tall although otherwise similar in structure to the standard dry cargo container. High-cubes are most often 40 feet long.
[73] Containers are manufactured in accordance with the ISO 668 standard, which classifies intermodal freight shipping containers and provides standardized size and weight. However, there is a variety of sizes and types under that standard.

The most common type of a container is the standard dry cargo container, also known as the general purpose container or the closed box container, which is designed for the transportation of dry materials. This container is ISO-standardized and, while its length may differ between 20 feet, 40 feet, 10 feet, or 30 feet, its width and height is always 8 feet and 8.6 feet respectively. The standard dry cargo container usually has doors at only one end.

The next three types of containers are envisaged to carry out of gauge cargo (OOG). These are goods and materials that extend beyond the standardized ISO dimensions of a shipping container for general purpose. Such cargo is, therefore, carried on flat rack containers, platforms, and open top containers.

Flat rack containers, or flat racks, are used for the transportation of cargo that is either overwidth or overheight, or both. They have the same dimensions as the abovementioned container type, and usually come in lengths of 20 and 40 feet but, unlike standard dry cargo containers, flat racks are missing a roof and their sides are collapsible. In some types of flat rack containers even the ends can be collapsed. These are called Collapsible Flat Racks and are, thus, converted into platforms. In essence, these platform containers have the shape and size roughly of a floor of a standard shipping container, with the exception that platform containers have much stronger base construction. Hence, they are appropriate for the carriage of heavy equipment and machinery, large vehicles, boats or other pleasure crafts that are being fastened to the flat rack. Cargo transported via flat racks or platform containers must be able to withstand moisture.

Open top containers, or open tops, has a convertible top. This means that the container's roof, which consists of portable roof-bows covered with tarpaulin, can be completely removed. The removable roof-bows serve not only to support the tarpaulin on top, but also to strengthen the roof and to add to the overall structural integrity of the container. The open top allows easy stuffing of the container as the interior is easily accessible through the top. Open tops are used the carriage of overheight and bulky cargo such as logs or odd-sized machinery as well as all kind of heavy cargo that can be loaded in the container only by means of an overhead crane.

Open end containers, also known as tunnel containers, have doors on both ends, which facilitates greatly loading and unloading the cargo in and out of the container.

Open side containers are used for easy stuffing of the cargo into the container. They are provided with doors located at either side of the container, which allows for a completely open side. This facilitates loading of overwidth materials which cannot be loaded easily through the normal door or through the roof. The usual cargo transported into such containers is vegetables and other edibles as well as pallets and unitized cargo.

Hardtop containers are available as 20-foot and 40-foot and are equipped with a removable steel roof, which is fitted with a forklift rings so that the roof could be removed by means of a forklift or crane. Thus, the container can be opened and closed much faster than a soft-top container (*i.e.* an open top container), which facilitates handling. The steel roof weighs about 450 kg (990 lbs.) and, if needed, it can be lashed to a side-wall and stowed upright inside the container during transport, thus leaving the top of the container open and, at the same time, occupying little space in the container –

it reduces the container width by only 13 cm. If required, tarpaulings could be utilized to cover the open top of the container. Moreover, if required for stuffing purposes, the removable roof can be manually uplifted by means of locking handles, without the need of using a forklift or a ladder, thus providing additional 7 cm. This increases the loading height and allows the carriage of over-height cargoes as well as heavy-load cargoes since the floor of the hardtop container is reinforced. Goods can be loaded both through the door opening and through the roof opening. The cargo can also be better lashed and secured as hardtop containers have more lashing points than standard dry cargo containers.

Another type of a special container, and a very popular one, is the refrigerated container, commonly known as a reefer. These temperature-regulating shipping containers are used to maintain certain pre-cooled cargo temperature and not to cool down the products or warm them up. Reefers have their integral refrigeration unit, which is dependent on external power. That is why refrigerated containers are to be found on deck where there are power points and where the reefers and their refrigeration equipment can easily be inspected during the journey. While temperature inside can be maintained up to 30°C and as low as -60°C, reefers are also equipped with a dehumidification system which guarantees the desired humidity in the container. These containers are generally set at their pre-determined temperature when they are loaded on board.[74] Also, refrigerated containers are fully functional at outside temperatures of up to 50°C.[75] A vast array of goods can be carried in a reefer, mostly perishable products such as meat, fish, seafood, dairy products, fruits, vegetables as well as fresh flowers, chemicals and pharmaceuticals. Those can be carried also in insulated or thermal containers that are lacking a refrigeration unit but also provide for temperature control due to their construction which is similar to the concept of the "thermos" bottle. Another way to maintain temperature is to connect such thermal containers to the vessel's refrigerating system by means of coupling units.[76]

Tank containers, known also as flexitanks or liquid bulk containers, are designed to carry a variety of bulk liquids such as chemicals but also vegetable oil and wine. They consist of an ISO framework, in which one or more cylindrical or spherical tanks are mounted.

The so called "bulktainer", or dry bulk container, is a container which is designed to carry cargo in bulk. It resembles a standard dry cargo container but it has hatches on the top that enable bulk cargo to be loaded into the container directly. The bulktainer also has gates at the bottom in order for the cargo to be discharged when the container is tipped or lifted above the ground.

Half height containers, as the name suggests, have half the height of the above mentioned containers that is, they are 4.3 feet high. The other dimensions are preserved.

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[74] Germanischer Lloyd Aktiengesellschaft – "Guidelines for the Carriage of Refrigerated Containers on Board Ships", Hamburg (2003), Section 1, para. A(4).
[75] Germanischer Lloyd Aktiengesellschaft – *"Guidelines for the Carriage of Refrigerated Containers on Board Ships"*, Hamburg (2003), Section 1, para. A(3).
[76] R. C. Springall – *'The transport of goods in refrigerated containers: an Australian perspective'*, Lloyd's Maritime and Commercial Law Quarterly, May 1987, Part 2, p. 216, at p. 222.

These containers are used for high-density cargoes, the weight of which cannot be supported by a standard dry cargo container.[77]

3.2 Container vessels and the necessary infrastructure

3.2.1 Container ship design

The introduction of containers was a technological progress, which resulted in a gradual switch from general cargo vessels to specially designed container vessels. Figures show that while the container-vessel fleet takes in 1980 only a tiny 1.6% share of the world's deadweight tonnage, in the year of 2000 the share of containerships is already 8%, and in 2014 it is 12.8%.[78] On the other hand, the world fleet of general cargo vessels has dropped from 17% in 1980 to 4.6% in 2014.[79]

As seen above, containers can be successfully carried on board general cargo vessels as long as the boxes are properly secured and lashed to ensure the sound loading and stowage of the containers. However, much of the containers are nowadays carried on purpose-built vessels that are designed exclusively for their carriage. Only these vessels, designed exclusive for the carriage of container, are designated as container ships. Vessels, which transport shipping containers as part of a mixed cargo, are referred to as "suitable for the carriage of containers in holds xxx and x".

A major technological advent in the construction of container vessels came in the late 1960s with the introduction of cellular container ships,[80] which have holds that are equipped with vertical rails (the cell guides). These vessels made possible for cargo space to be optimally used and container stowage to be much more efficient.

As pointed out in *section 2.3*, from the perspective of maritime economics, the construction of bigger container vessels leads to concentration on the market of liner shipping. On the other hand, the bigger the vessel the bigger economies of scale, which translates into an efficient and reliable transportation service, offered at a low cost. Besides the lower freight rates, large container vessels are also characterized by the fact that they are usually offering service along major shipping routes, where demand is significantly big and where the full capacity and benefits of the vessel can be exploited.[81]

There are several other driving factors, which have caused container-carrying capacity to rise constantly. One of the reasons for container vessels getting bigger and bigger can be traced back to the oil crisis in 1970s, as a result of which the average speed of containerships dropped within a decade from 25 to 20 knots in order fuel to be saved.[82] Now that the practice of slow steaming had made it obsolete to pursue ship designs that

[77] Capt. R.E. Thomas – *'Thomas' Stowage'*, 2nd edition (1985), pp. 52-53.
[78] UNCTAD – *Review of Maritime Transport 2014*, p. 29.
[79] UNCTAD – *Review of Maritime Transport 2014*, p. 29 (*ibid.*)
[80] Known as gearless ships, these are purpose-built container vessels deprived of any cargo gear.
[81] Meifeng Luo, Lixian Fan and Wesley W. Wilson – *'Firm growth and market concentration in liner shipping'*, Journal of Transport Economics and Policy (JTEP), Volume 48, Number 1, 1 January 2014, pp. 171-187, at p. 180.
[82] Marc Levinson – *'The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger'*, Princeton University Press (2006), p. 234.

would allow higher speed, naval engineers could instead focus on increasing the payload of container vessels.[83]

Secondly, globalization processes and the increase in world trade have also an impact on the growth of containerization. With the world economy getting bigger, and with nations increasingly trading with one another, there is more cargo to be transported. Naturally, when cargo, which is primarily moved by means of containers, has risen, so is the demand for containers and container-carrying vessels. This reverse impact is another example of the symbiosis between containerization and globalization.

Thirdly, the significant economies of scale, the increased operating efficiency (*e.g.* fuel efficiency) as well as the optimized environmental impact – all benefits that are achieved through the employment of bigger container vessels – have directly led to a staggering growth in the size of container ships and to a continual increase in their capacity. For example, in 2005 the largest containership was Hapag-Lloyd's *Colombo Express* – 1,099 feet (335 meters) long and 141 feet (43 meters) wide – which was capable of carrying 8,449 TEUs. The ship's capacity was double the capacity of any of McLean's *Econships* (4,258 TEUs) that had been the biggest container vessels at the time when they had been acquired in 1984.[84] In other words, the capacity of container vessels had doubled for a period of about 20 years between 1984 and 2005, which is a period that is even shorter than the lifespan of a containership.[85] Interestingly, the largest container vessel in 2015 is *MSC Oscar*, 1,297 feet long (395.4 meters) and 194 feet wide (59 meters), with a capacity of 19,224 TEUs – more than double the capacity of the *Colombo Express* launched in 2005. This means that the pace in shipbuilding has nowadays increased even more as it has taken twice less time to double the capacity of the existing biggest container vessel.[86]

Apart from the incredible pace of the shipbuilding industry, the overall increase in container-capacity since the beginning of the container revolution is also striking: the container-carrying capacity is estimated to have increased by about 1,200% in the last 50

[83] The financial crisis in 2008-2009 resulted in a further drop of the cruising speed of container vessels as shipping companies introduced the so called slow steaming, which takes place at the rate of 18-20 knots. Two main advantages stem from cutting sailing speed – these are the reduction of oil consumption (less tons of bunkers used per day) and the reduction of greenhouse gas emissions. Nowadays, there are four main containership speed classes. Normal speed is considered to be 20-25 knots (37-46 km/h), which is the optimal design speed for a containership. Slow steaming is in the range of 18-20 knots (33-37 km/h), which provides fuel savings but extends cruising time; more than half of the container vessels operate with that speed. Extra slow steaming (super slow steaming or economical speed) is carried out at the speed of 15-18 knots (28-33 km/h) and it decreases fuel consumption even further but is applied on shorter distances because the travelling time is substantially extended. Lastly, the minimal cost class allows steaming at 12-15 knots (22-28 km/h) and it is the lowest technically-possible speed as any speed slower than that does not bring any further fuel economies. However, such a slow speed is not commercially viable. See: T. Notteboom and P. Cariou – *'Fuel surcharge practices of container shipping lines: Is it about cost recovery or revenue making?'*, IAME Conference, Copenhagen, 24-26 June 2009.

[84] Brian J. Cudahy – *'Box Boats: How Container Ships Changed the World'*, Fordham University Press, New York (2006), p. 241.

[85] The average lifespan of a container vessel is about 26 years. Source: the World Shipping Council, http://www.worldshipping.org/about-the-industry/liner-ships/container-ship-design.

[86] To be precise, *Colombo Express*'s capacity of 8,449 TEUs was doubled already in 2013 when Maersk acquired their *Triple-E* class container vessels, each with capacity of over 18,000 TEUs. Therefore, it took only eight years for the shipping industry to produce a vessel that can carry twice the amount of containers that the biggest container vessel in 2005 was capable of transporting.

years.[87] This growth in size and capacity, however, are not limitless. Container vessels must be able to enter world's major ports and, therefore, draft, length and width has to be not excessively big in order for the ship to be able to call at the particular port and use its infrastructure. In particular, the beam of future container vessels may be constrained by the reach of the new-generation shore-based gantry cranes which have to have access up to the outermost row of containers. Cranes were traditionally designed to reach up to 13 containers wide but today's state-of-the-art container vessels require cranes that have much greater reach – 22-23 containers wide.[88]

By September 2015, there are over 6,000 liner vessels, 5,145 of which are fully cellular ships.[89] Today, there are four categories of container vessels according to their capacity: feeder vessels (<1000 TEUs), handy-size vessels (1,000-3,000 TEUs), Panamax vessels[90] (up to 4,000 TEUs), and post-Panamax vessels (up to about 19,000 TEUs). The post-Panamax category has constantly been changed as major container operators are persistently ordering vessels with an enhanced design allowing greater capacity. The crown for the world's biggest container vessel has been quickly passed from one vessel to another in the recent years. As of 2013 up to late 2014, Maersk *Triple-E* vessels, with their capacity of 18,270 TEUs, were the biggest containerships by the time with staggering size and tonnage (400 meters long; 59 meters beam; 16 meters draft; 165,000 DWT). Then, in November 2014, *CSCL Globe*, owned by the Shanghai-based China Shipping Container Line (CSCL), set a new record with its capacity of 19,100 TEUs and increased tonnage (184,320 DWT). But her reign didn't last for long as only two months later, in January 2015, *MSC Oscar*, operated by the Mediterranean Shipping Company (MSC) and capable of carrying 19,224 TEUs, was christened.

This is to show that container ships continue to get bigger in terms of carrying capacity. What is more, the trend to design and construct container vessels with bigger and bigger capacity is here to stay. Maersk Line, the biggest container operator and a subsidiary of the oil and shipping giant A.P. Møller-Mærsk Group, already announced that they ordered 11 new container vessels, which will have a capacity of 19,630 TEUs each, and which will be employed in the busiest trade route – Asia-Europe.[91] Furthermore, industry experts predict that next-generation container vessels will have a capacity of 22 to 24 thousand TEUs and length of up to 400-450 meters.[92] Any further extension of the length of container vessels, however, is deemed unlikely because of the steeply rising additional costs associated with constructing longer ships, which will start

[87] Source: the World Shipping Council, http://www.worldshipping.org/about-the-industry/liner-ships/container-ship-design.
[88] UNCTAD – *Review of Maritime Transport 2014*, pp. 70-71.
[89] Alphaliner – Cellular Fleet September 2015. Available at: http://www.alphaliner.com/top100/
[90] The Panamax category will most likely undergo changes with the expansion of the Panama Canal which is underway and is expected to be completed by 2016. Current Panamax vessels are 294 meters long, 32 meters wide, and have a draft of 12 meters. When the Panama Canal expansion project is completed, the biggest vessels capable of crossing it will be 366 meters long, 49 meters wide, and have a draft of 15 meters. These vessels will form an additional category called New Panamax. The number of TEUs carried on a New Panamax vessel will inevitably grow as current indications point at 13,000 TEUs. Source: Official Website for the Panama Canal Expansion, http://micanaldepanama.com/expansion.
[91] The Wall Street Journal – *'Maersk CEO Predicts Big Squeeze for Small Container-Ship Operators'*, June 5, 2013.
[92] UNCTAD – *Review of Maritime Transport 2014*, p. 71.

running contrary to the economies of scale.[93] And it is precisely the economy of scales which has been the main driving factor for the development of bigger containerships.

3.2.2 Critical infrastructure

The growth of containerships runs in parallel with the development of ports and local infrastructure, with the automatization of a lot of the operations during loading, stowing, and discharging as well as with the introduction of powerful computer systems and software that are capable of tracking the containers and of developing detailed stowage plans for the placement and positioning of those containers on board in the most efficient way[94] and also with regard to the vessel's stability. Automation has also played a great role in ports. Automated stacking systems boost even further the productivity at the shore. Higher productivity means more containers being serviced and moved per hour, which allows seaborne trade to take place faster. Without computer systems to instantly locate a container amidst the thousands of other containers lying in a container terminal, the whole transportation of containerized goods would be nearly halted. That is why it is a vital prerequisite that each and every container involved in the transportation industry have an identification number.[95]

Cranes also deserve a special merit and are as important as containerships when it comes to the quick loading or discharging of containerized cargo. In order to efficiently serve today's big container vessels, gantry cranes are installed on rails that run in parallel to the berthed vessel so that both the fore and the aft sections can be accessed. Gantry cranes can be up to 430 feet (131 meters) tall and, in order to reach out the outermost row of containers, they are able to embrace the beam of any container vessel, some of which are wider than the Panama Canal. Each crane is guided by an operator located in a cabin high on the crane. The crane lifts a container by means of a spreader. This is a device with a rectangular frame, which corresponds to the size of a container's roof, and which attaches to the four corners of the metal box. The spreader is able to reach every container through a trolley, to which it is hanged, and which moves along the beam of the vessel. In this way, an average crane is able to move about 30-40 containers per hour from the ship to the dock or vice versa, which means that a container is loaded every two minutes. For comparison, it took seven minutes for the crane to load a container on the *Ideal-X* back in 1956.[96]

It is thus far obvious that the containerized service has become an ever more integrated process, which includes the construction of container terminals with suitable berth facilities and the necessary draught, container depots and container freight stations as well as sophisticated hardware and software equipment. Container traffic has shaped three categories of ports nowadays: hubs, also known as load centers, which service the biggest container vessels, operating at great distances, and where containers are transhipped to smaller ports; direct ports, which service bigger vessels but do not

[93] UNCTAD – *Review of Maritime Transport 2014*, p. 71 (*ibid.*)
[94] An example is stowing reefer containers in bays where there are electrical plugs to supply power to the refrigerating equipment; or stowing containers carrying hazardous cargo away from other containers which may pose risks of explosion or other adverse effects if they interact with each other.
[95] See: *section 3.1.2*.
[96] Marc Levinson – *'The Box: How the Shipping Container Made the World Smaller and the World Economy Bigger'*, Princeton University Press (2006), p. 51.

perform transhipment, and feeder ports, which serve smaller vessels that operate between the feeder port and the closest load centers.[97]

3.2.3 Stowage planning and positioning of containers

Stowage planning is required in order to allocate space for a container on board a containership taking into account the order of the port of calls and the port where the container has to be discharged as well as the size, type, and weight of the container, and, in some instances, the nature of the cargo (*e.g.* hazardous cargo, out of gauge cargo, refrigerated goods). Nowadays, this process is mostly performed by computers and software systems such as CASP (Computer Automated Stowage Planning) and Bulko. In general, all containers are segregated by destination as the containers destined for the farthest destination go to the bottom of the vessel, while those that are to be discharged at the next port of call go to the top. In a similar fashion, containers are segregated by weight as the heavier the box the more to the bottom it will be stowed and vice versa.

To stow thousands of containers within a few hours, taking into account all characteristics of every container, has now turned into a task within the bounds of possibility mostly due to the increasing automatization of processes and also to the smart and universally applied system of locating, positioning and stowing a container, known as the bay-row-tier system.[98]

According to that system, each and every container on board a containership has a stow position, or also known as a cell position. The position is recorded in a concise manner through digits (*e.g.* 090284), and this short inscription reveals information such as whether it is a TEU or a FEU, whether it is stowed under deck or on deck, and also whether it is stowed at the port side or at the starboard side. The stow position of the container on board the ship is expressed through numerical coordinates that consist of six digits. The first two digits give information about the bay in which the container is stowed; the second couple of digits shows the row in which the container is positioned, and the last two digits indicates the tier. Therefore, to understand a stow position, one must be familiar with the notions bay, row, and tier as employed in containerized carriage and also how these are marked on the stowage plan. The stowage plan represents a full cross-sectional view of the containership, and the number of cross-sectional views is equal to the number of bays on board the ship.

Bays generally split a containership into compartments that run from the bow to the stern of the vessel. Thus, a bay is a compartment with the shape of the profile (the cross sectional view) of a containership, and it comprises both under deck and on deck space. Depending on the size of the container vessel, bays are designated with a number ranging from 01 to 40, where Bay 01 is the bay on the front of the vessel and Bay 40 is the bay on the aft. A single bay of, for example, the 2013 *Triple-E* type container vessels has a capacity of up to 459 TEUs.[99]

A row is a layer of containers that is situated lengthwise the vessel, namely it runs along the ship. Accordingly, the row number designates the container's position

[97] Mark Garrett (editor) – *'Encyclopedia of Transportation: Social Science and Policy'*, SAGE Publications, Inc. (2014), Volume 1, p. 417.
[98] German Insurance Association (GDV) – *'Container Handbook'* (2012), section 1.3.3 Container stowage plans.
[99] For comparison, a bay in an average container vessel in 1996 could accommodate up to 130 TEUs.

across the beam of a container vessel. Depending on the structure of the ship, rows are designated with numbers which start at 01 if the number of rows is even or at 00 if the number of rows is odd. In the latter case, Row 00 is situated in the middle of the bay (the center line of the vessel), around which the other rows are situated in a progressing order as odd-numbered rows progress rightwards and even-numbered rows progress leftwards. If rows start at 01, then Row 01 and Row 02 are located in the centerline of the vessel, with the other rows located following the same principle.

Tiers are, essentially, vertical layers of containers. The tier expresses the level on which a container is loaded or, in other words, how high the container is stowed. Tier numbers start from 02 for containers stowed under deck and increase per two – *e.g.* Tier 04, Tier 06, Tier 08, and so on. Tier numbers for containers stowed on deck start from 80 and also increase by two – Tier 82, Tier 84, Tier 86, *etc.* Therefore, tiers are always expressed with even tier numbers.

Thus, knowing the bay, row, and tier allows identifying the precise location where the container is stowed. Extra information is provided by the numbers themselves depending on whether they are even or odd numbers. For example, odd bay numbers (such as Bay 1, Bay 3, Bay 5) indicate that it is a 20-foot stow, whereas even bay numbers (such as Bay 2, Bay 4, Bay 6) shows that it is a 40-foot stow.[100] With regard to rows, as stated, Row 01, together with Row 02, is centred in the middle of the bay, and all odd numbers (Row 3, Row 5, Row 7) progress outwards towards the right, while all even number (Row 2, Row 4, Row 6) progress outwards towards the left. Given that each plan is viewed from behind of the vessel, namely from the stern, odd numbered Rows are located closer to the starboard while even numbered rows are located closer to the port.

Applying this system to the example provided above, 090284, it means that the container is a TEU stowed in Bay 09, Row 02, and Tier 84, the latter showing that it is stowed on deck. Another example, 400502 is a 40-foot container, because the bay number is even, and it is stowed on Bay 40, the last bay on the stern, Row 05, and Tier 02, which is the bottommost tier under deck.

The stowage position, as expressed in numbers, is usually written down in the shipping documents, which allows, after the journey has been completed, verifying where exactly the container was stowed and carried, and this could be valuable evidence when establishing the factual setting in a subsequent lawsuit for cargo damage, for example.

On an average post-Panamax container vessel, underdeck stowage reaches up to eleven containers high, while containers that are stacked on deck reach up to ten containers high and 22-23 containers across. They are usually interlocked with fittings.

[100] The rationale behind this numbering is as follows. All 20-foot containers (TEU) are assigned odd bay numbers – 01, 03, 05, 07, 09, *etc.* Thus, when a 40-foot container (FEU) is loaded, it will be sitting across two neighbouring bays – for example, Bay 05 and Bay 07. That is why the FEU will be given a bay number 06, while in the stowage plan (also known as the bay plan, which represents a full cross-sectional view of the vessel) the FEU will be shown as sitting on Bay 05 and the corresponding slot on the adjacent Bay 07 will be marked with X to signify that the slot is not available for stowing another container because it is occupied by the FEU as well.

4. The concept of containers – is a container considered a package for the purpose of the Hague and Hague-Visby Rules?

In order to define the specific character of the carrier's obligations over cargo carried in containers, one has to establish the legal content of the metal box itself. In the above sections, the nature of the shipping container was analyzed from technical and economic perspective but the kernel of the matter lies in the legal conceptualization of containers. While earlier maritime legislation unsurprisingly did not address containers, present-time conventions fell under the influence of containerization. In that regard, containers also have an impact on the carrier's obligations over the cargo prescribed by the Hague-Visby Rules.

Existing international conventions are unsuccessful in giving a clear and uniform answer to what constitutes a container, and that leaves to the courts plenty of leeway for interpretation.[101] To begin with, it is not easy to define a container either as part of the vessel or as cargo. Authorities in various situations have considered containers differently and have viewed them as, for example, *"detachable storage compartments of the ship"*,[102] *"a large metal object, functionally part of the ship"*,[103] *"a modern substitute for the hold of the vessel"*,[104] *"a functional package"*,[105] *"a sophisticated form of package"*,[106] or as *"an instrument of transportation service"*.[107] This divergence is mainly due to the fact there are a lot of variables involved in containerized shipments, namely what are the carriage conditions (FCL/LCL); who has supplied the container; what type of a container ship is used for the carriage, *etc.*

A decisive factor in determining the nature of containers seems to be where one puts the accent. One interesting opinion, for example, stresses on the fact that containers are being used not solely to consolidate and accommodate cargo but also to secure adjacent containers by stacking them one on top the other and lashing them together, which leads to the conclusion that the carrier's obligation to load, stow, secure, and lash the cargo on board cannot be performed without the use of containers.[108] Looked from that angle, containers indeed seem to draw nearer to the concept of being part of the vessel. Although the author of the current academic thesis has not found similar reasoning in case law, it represents a very interesting view and a well substantiated one.

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[101] Pierre-Jean Bordahandy – *'Containers: a conundrum or a concept?'*, (2005) 11 JIML342, at p. 347.
[102] *The "Aegis Spirit"*, [1977] 1 Lloyd's Law Reports 93, at p. 102.
[103] *Leather's Best Inc v S.S. Mormaclynx*, United States Court of Appeal, Second Circuit (1971), 451 F.2d 800, at p. 815.
[104] *Northeast Marine Terminal Co. v Caputo*, U.S. Supreme Court, 432 U.S. 249 (1977), at p. 270.
[105] *Royal Typewriter v M/V Kulmerland (The "Kulmerland")* and *Cameco v S.S. American Legion (The "American Legion")*, [1975] 1 Lloyd's Reports 295.
[106] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'* (20th edition), Sweet & Maxwell (1996), p. 376, Article 183.
[107] CMI – *'The Travaux Préparatoires Of The International Convention For The Unification Of Certain Rules Of Law Relating To Bills Of Lading Of 25 August 1924 The Hague Rules And Of The Protocols Of 23 February 1968 And 21 December 1979 The Hague-Visby Rules'*, p. 570.
[108] Talal Aladwani – *'The Supply of Containers and "Seaworthiness" – The Rotterdam Rules Perspective'*, 42 JMARLC 185, at p. 188.

Another resemblance between a seagoing vessel and a carrier-supplied container is the concept of container demurrage, which can be likened to the demurrage paid with regard to a ship.[109] In essence, they both represent liquidated damages for late return of preliminarily provided equipment or property that is supplied by the carrier or shipowner for the purpose of the carriage of the cargo. The container demurrage is charged by the shipping lines when their customers hold the container at the container terminal for longer than the agreed free days. If the container is held by the customer outside the container terminal for longer than the agreed time, then he will be levied detention charges. Thus, container demurrage (usually levied for import cargo)[110] is charged on the basis of the agreed period between the discharge from the vessel until gate-out of the full container, whereas container detention charges for import cargo[111] are levied with regard to the period between gate-out of the full container up until gate-in of the empty container.[112] Very often the charge type will be merged, which is called a Merged Demurrage & Detention Time (merged D&D).[113] It relates to the duration of the two periods combined and applied on the basis described above as well as in accordance with whether it is an import or an export cargo. In effect, demurrage relates to a container which has cargo in it, whereas detention is related to an empty container, and both are charged after the free time has expired.

The questions of whether a container is a package or not, and whether it is part of the vessel or part of the cargo, are not necessarily overlapping and will not always lead to the same answer although they may seem identical at first sight. In general, when a container is characterized as a package, it will be thought of as part of the cargo, while when it is not considered a package, it will be perceived as part of the vessel. However, it could be the case that a shipper-supplied container (*i.e.* part of the cargo) is not considered a package for limitation purposes. As it will be shown in this section, a straightforward solution to conceptualizing containers cannot easily be found.

A definition of a container can be found in a few international instruments. First of all, the Convention for Safe Containers (CSC) defines the term in the following manner:

> ***Article II***
> ***Definitions***
> *For the purpose of the present Convention, unless expressly provided otherwise:*
> *1. ""Container"" means an article of transport equipment:*
> *(a) of a permanent character and accordingly strong enough to be suitable for repeated use;*
> *(b) specially designed to facilitate the transport of goods, by one or more modes of transport, without intermediate reloading;*

[109] See *Chapter I*, section 2.2.3 above.
[110] Container demurrage with regard to export cargo comprises the period between gate-in of the full container until loading on board the vessel.
[111] Accordingly, the period relevant for container detention charges for export cargo is between the picking of the empty container by the merchant at the terminal until gate-in of the full container.
[112] See, for example, the general terms of CMA CGM on: https://www.cma-cgm.com/ebusiness/tariffs/demurrage-detention.
[113] It is also known as combined demurrage/detention.

> *(c) designed to be secured and/or readily handled, having corner fittings for these purposes;*
> *(d) of a size such that the area enclosed by the four outer bottom corners is either:*
> *(i) at least 14 sq.m. (150 sq.ft.) or*
> *(ii) at least 7 sq.m. (75 sq.ft.) if it is fitted with top corner fittings;*
> *the term "container" includes neither vehicles nor packaging; however, containers when carried on chassis are included.*[114]

It is evident that containers, at least from a safety perspective, are not characterized as packaging or vehicles. The ISO international standard for shipping containers, furthermore, has a very similar definition. According to ISO 668:2013(E), a freight container is also an article of transport equipment, which is:

> *a) of a permanent character and accordingly strong enough to be suitable for repeated use;*
> *b) specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading;*
> *c) fitted with devices permitting its ready handling, particularly its transfer from one mode of transport to another;*
> *d) so designed as to be easy to fill and empty;*
> *e) having an internal volume of 1 m3 (35,3ft3) or more*
> *Note 1 to entry: The term "freight container" does not include vehicles or conventional packing.*

While the definition in both conventions reveals that vehicles and packaging do not qualify for a container, it still remains unclear whether a container, consolidating goods, can be considered a package for the purpose of limiting the carrier's liability and also with regard to the application of the carrier's cargo-related obligations. And establishing how the law defines containers is vital for the operation of the relevant Hague and the Hague-Visby Rules' provisions, especially those addressing carrier's responsibilities and liabilities. A useful discussion about the legal nature of containers can be found in the debate whether a container is a package or not for the purpose of limitation of liability. In this regard, the 1924 Convention and the 1968 Visby amendments vary to such a degree that both instruments deserve to be discussed and analyzed separately.

4.1 The Hague Rules

Although the issue of the proper construction of the Hague Rules regarding what constitutes a "package" has been in the centre of disputes between cargo underwriters and P&I clubs since the dawn of containerization, it has not been approached by English law until the late 1990s.[115] Much earlier before that, however, American courts were confronted with this problem and produced conflicting solutions.

When US courts were faced with the issue whether a container is a COGSA package, they usually took into account three main factors: the ownership of the

[114] Convention for Safe Containers (1972), Article II.
[115] *The "River Gurara"*, [1996] 2 Lloyd's Law Reports 53, at p. 55.

container, the information on the bill of lading, and the nature and physical characteristics of the cargo inside the container.[116] There are three distinct standpoints of American courts with regard to the status of containers in US COGSA, which is the US enactment of the Hague Rules, and each of these standpoints puts more or less emphasis on the factors just mentioned. These three separate views will be discussed in a nutshell and they are as follows.

Firstly, the decisions in *Leather's Best Inc v S.S. Mormaclynx*[117] and *Shinko Boeki Co. v S.S. Pioneer Moon*[118] strongly maintain the proposition that carrier-owned containers whose contents are fully disclosed are not considered a "package" within the meaning of COGSA but are *"functionally part of the ship"*.[119] This view reflects the traditional reluctance of US courts to consider containers as packages, because such an approach may allow carriers and their P&I insurers to abuse the package limitation provision (§ 1304(5) of US COGSA, which is the equivalent of Article IV rule 5 of the Hague Rules) and virtually nullify it by rendering it meaningless – a cargo claim for a monetary compensation for a single package would not even justify the litigation costs.[120] However, this first US approach to classify containers, namely not considering a container a "package", is a satisfactory solution to possible problems that may arise in LCL shipments when a container holds packaged cargo of more than one shippers and/or consignees. Thus, this view relies highly on the party who stuffed the container. If it was the carrier to consolidate the cargo in the container, the court will not allow the container to be characterized as a package and any such provision will be struck by § 1303(8), which is the equivalent of Article III rule 8. Conversely, if it was the shipper to stuff and seal the container without enumerating the contents on the bill of lading, it is very likely that the container will be treated as a package by courts.[121]

The second view, which is highly criticized, is enshrined in the rulings of *Royal Typewriter v M/V Kulmerland*[122] and *Cameco v S.S. American Legion*,[123] which introduced the so called functional economics test. According to that test, a container could be considered a functional package provided that the cartons or packaging units inside were not solid enough to withstand the carriage of break bulk, and the container was thus essential for the preservation of those cartons or packaging units. Accordingly, the opposite presumption is created if the individual cartons or wrappings stowed inside the container meet the abovementioned criteria that is, they are sturdy enough to withstand break bulk carriage. In that latter case, it is the packaging units inside the container that are considered packages within COGSA, and not the container itself.

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[116] Mary Elizabeth Reisert – *'A Container Should Never Be a Package: Going beyond Mitsui v. American Export Lines, Inc.'*, Pace Law Review (1982), Vol 2:309, at p. 310.
[117] *Leather's Best Inc v S.S. Mormaclynx*, U.S. Court of Appeals for the Second Circuit (1971), 451 F.2d 800; [1971] 2 Lloyd's Law Reports 476.
[118] *Shinko Boeki Co. v S.S. Pioneer Moon (The "Pioneer Moon")*, [1975] 1 Lloyd's Reports 199.
[119] *Shinko Boeki Co. v S.S. Pioneer Moon (The "Pioneer Moon")*, [1975] 1 Lloyd's Reports 199, at p. 201.
[120] See: Meagen Leary – *'Say What You Mean and Mean What You Say: Edging Towards a Workable Container Solution'*, 28 TLNMLJ 191 (2003), at pp. 194-196, and Mary Elizabeth Reisert – *'A Container Should Never Be a Package: Going beyond Mitsui v. American Export Lines, Inc.'*, Pace Law Review (1982), Vol 2:309, at p. 327.
[121] John F. Wilson – *'Carriage of Goods by Sea'*, 7th edition (2010), p. 197.
[122] *Royal Typewriter v M/V Kulmerland (The "Kulmerland")*, [1973] 2 Lloyd's Reports 428.
[123] *Cameco v S.S. American Legion (The "American Legion")*, [1975] 1 Lloyd's Reports 295.

Thus, this "functional package unit" test comes down to whether the cargo owner's packages are functional, *i.e.* usable, for overseas shipment.

This is a dubious solution because neither the Hague Rules nor US COGSA hint that goods within a container may be considered as carried in packages, or not, based on a vague standard of how durable the packaging is. Furthermore, the presumption created by the functional economics test in both instances can be rebutted if there is evidence of the intention of the contracting parties to the opposite effect. Thus, the parties' intent is decisive according to this view, which is another serious flaw because contractual parties cannot be expected to arrive at a characterization of containers that is always sound and consistent with the wording and purpose of the statute. This is a duty for the court to do through interpretation.[124] Besides, a rule that is dependent on the parties' intention undermines the negotiability of the bill of lading because a prudent third party B/L holder would have great difficulties establishing the corresponding intent solely from the four corners of the bill. Thus, he will be unsure if his shipment is characterized as a single package, and also uncertain of the risks he undertakes.[125]

In *The "Aegis Spirit"*, Beeks D.J. held carrier-owned containers to be not a package within the meaning of COGSA, thus sharing the reasoning expressed in *The Mormaclynx* and *The Shinko Boeki*. The functional economic test found in earlier US decisions was rejected, and the fundamental factor was no longer the 'parties' intent but the legislative intent of the drafters and the court's interpretation. The district judge submitted that it was according to the plain and ordinary meaning of the term to consider the cartons inside the container as "packages" for the purpose of COGSA.[126] Containers, on the other hand, were deemed to be conceptually different than packages:

> *I would liken these containers to detachable stowage compartments of the ship. They simply serve to divide the ship's overall cargo space into smaller more serviceable loci. Shipper's packages are quite literally "stowed" in the containers utilizing stevedoring practices and materials analogous to those employed in traditional on board stowage.*[127]

If this reasoning is objectively tested, then the comparison seems to have some shortcomings. One fails to see how a ship's stowage compartment could be lost at sea during a stormy weather; how it could be owned by a party that is not the shipowner; and how it could be loaded and unloaded hundreds of miles away from the port. Obviously, there is more than a cargo space involved when we are talking about shipping containers. Regardless of these imperfections in Beeks D.J.'s parallel between a container and a ship's detachable stowage compartment, the clear distinction expressed by the judge between shipper-packaged cargo, on the one hand, and carrier-owned containers, on the other, suggests that there is a possibility for a container to be eventually considered as a "package" if it is owned and stuffed by the cargo interests. However, such possibility was not elaborated by the court:

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[124] *The "Aegis Spirit"*, [1977] 1 Lloyd's Law Reports 93, at p. 100.
[125] *The "Aegis Spirit"*, [1977] 1 Lloyd's Law Reports 93, at p. 100 (*ibid.*).
[126] *The "Aegis Spirit"*, [1977] 1 Lloyd's Law Reports 93, at p. 102.
[127] *The "Aegis Spirit"*, [1977] 1 Lloyd's Law Reports 93, at p. 102 (ibid).

> *[…] the appropriate application of the COGSA package limitation to containers owned by a shipper or any person other than the carrier such as a freight forwarder must await future determination.* [128]

The third approach to classifying containers as a COGSA package or not has been shaped in three cases from the Second Circuit – *Mitsui*,[129] *Binladen*,[130] and *Monica Textile*.[131] The rule enshrined was later modified by two lower courts from the Southern District of New York – *Orient Overseas*,[132] and *Alternative Glass Supplies*.[133] In essence, the rule is that *"when a bill of lading explicitly discloses on its face the number of units within a container, and those units may* ***reasonably be considered*** *COGSA packages, then each of the units and not the container constitutes a COGSA package"* [emphasis added].[134] What is peculiar about this approach is that it sets a two-pronged standard whereby the reasoning is separated into two parts – the first one being the contractual agreement between the parties as evidenced in the bill of lading and the second one being the external evidence which is to indicate whether the contents of the container are packaged or not. Those other additional pieces of evidence are believed to be found in invoices, testimony, and photographic materials.[135] Both parts of the inquiry must be satisfied in order for the court to held the agreement between the parties valid. Thus, a shipment, which is listed in the bill as "2 containers said to contain 30 bundles of ingots" but the ingots are in fact only stacked and are neither strapped together nor secured in any way, is considered as two packages.[136] An exception to this rule is allowed when the parties expressly and unequivocally agreed to the contrary, namely that the container is the COGSA package, but such an agreement will require more than boilerplate wording in the B/L or inscribing the number of containers under the column "number of packages".[137] Furthermore, when a bill of lading does not list the contents inside the container as packaged, a court may look only in the contract of carriage and neglect the physical characteristics of the cargo inside a container – in this case the container will also be the COGSA package even if it has not been listed as such in the bill as long as no item or unit is described in the B/L as packaged for transport even if some of those units have in fact been prepared for shipment.[138] That is, even if packaged items are stowed inside the container they will not be eligible to be considered packages since they were

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[128] *The "Aegis Spirit"*, [1977] 1 Lloyd's Law Reports 93, at p. 103.
[129] *Mitsui & Co., Ltd. v American Export Lines, Inc.*, U.S. Court of Appeals for the Second Circuit (1981), 636 F.2d 807.
[130] *Binladen BSB Landscaping v M/V Nedlloyd Rotterdam*, U.S. Court of Appeals for the Second Circuit (1985), 759 F.2d 1006.
[131] *Monica Textile Corp. v S.S. Tana*, U.S. Court of Appeals for the Second Circuit (1991), 952 F.2d 636.
[132] *Orient Overseas Container Line v Sea-Land Service*, U.S. District Court, S.D. New York (2000), 122 F.Supp.2d 481.
[133] *Alternative Glass Supplies v M/V Nomzi*, U.S. District Court, S.D. New York (1998), No. 97-C4387.
[134] See: *Mitsui* at pp. 818-821 and *Monica Textile* at p. 639.
[135] Meagen Leary – *'Say What You Mean and Mean What You Say: Edging Towards a Workable Container Solution'*, 28 TLNMLJ 191 (2003), at p. 205.
[136] *Mitsui & Co., Ltd. v American Export Lines, Inc.*, U.S. Court of Appeals for the Second Circuit (1981), 636 F.2d 807.
[137] *Monica Textile Corp. v S.S. Tana*, U.S. Court of Appeals for the Second Circuit (1991), 952 F.2d 636.
[138] *Binladen BSB Landscaping v M/V Nedlloyd Rotterdam*, U.S. Court of Appeals for the Second Circuit (1985), 759 F.2d 1006. However, in *Alternative Glass Supplies v M/V Nomzi*, the court looked into the physical characteristics of the cargo inside the container in order to establish whether there is evidence of packaging.

not disclosed in the bill of lading.[139] Remarkably, those cases leaned in their reasoning also on the Visby Protocol in order to support international uniformity[140] but the results are, nevertheless, a rather non-uniform and fact-oriented approach which is formed on a case-by-case basis.

Having considered the three distinct views on containers, it is safe to conclude that they do not provide a definite solution to the issue of establishing whether the container is or is not a package. These American decisions, forming seemingly contradictory views on containers, are deemed to suffer from a "yoyo" effect, which is a serious obstacle for the predictability of court decisions involving damaged or lost containerized cargo.[141] However, it is submitted that US courts nowadays generally consider a COGSA package to be each package inside of a container which is enumerated as such on the face of the bill of lading, or at least which could be reasonably considered as a COGSA package.[142] Conversely, the container is considered a COGSA package if the above conditions are not fulfilled or if extrinsic evidence contradicts the number of packages that is shown on the face of the bill.[143] This test summarizes the third view discussed above, and it is more oriented towards the intention of the parties, at least if compared to the functional economics test, while at the same time it seems to stand close to the approach codified in the Hague-Visby Rules.[144]

The decision in *The "River Gurara"*, which was the first reported English case to address the problem of whether a container is a "package" or not, concerned a voyage from West Africa to Europe, which ended up with the total loss of the vessel and her cargo near the Portuguese coast.[145] Most of the goods were carried in containers and disputes arose whether the carrier could rely on a bill of lading clause, which stipulated that shipper-packed containers were considered "packages" within the meaning of the Hague Rules, thus allowing the carrier to limit his liability to £100 per container in accordance with Article IV rule 5 of the Hague Rules.[146] The containers were stuffed by the shippers privately and they were listed in the bill of lading as "said to contain" a certain amount of packaged items. Cargo interests, on the other hand, insisted that the

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[139] *Orient Overseas Container Line v Sea-Land Service*, U.S. District Court, S.D. New York (2000), 122 F.Supp.2d 481.

[140] It should be reminded that the US COGSA is the US enactment of the Hague Rules, and, since its codification, the Act has not been changed. Although, following the Visby Protocol, amendments to US COGSA have been proposed (the most recent ones in 1996), it has not been updated and it does not incorporate the provisions of the Hague-Visby Rules. Therefore, these US court decisions are more relevant to the discussion about the status of containers under the Hague Rules, even though in their reasoning they also consider the position under the Hague-Visby Rules.

[141] Pierre-Jean Bordahandy – *'Containers: a conundrum or a concept?'*, (2005) 11 JIML342, at p. 355.

[142] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), Chapter 30, p. 1538.

[143] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), Chapter 30, p. 1538. (*ibid.*)

[144] See section 4.2 below.

[145] *The "River Gurara"*, [1996] 2 Lloyd's Law Reports 53; [1998] 1 Lloyd's Law Reports 225.

[146] Clause 9 of the UK West Africa Line stated *inter alia*: "If a container has not been packed or filled by or on behalf of the carrier […] (B) notwithstanding any provision of law to the contrary the Container shall be considered a package or unit even though it has been used to consolidate the Goods, the number of packages or units constituting which have been enumerated on the face hereof as having been packed therein by […] the Merchant and the liability of the Carrier […] shall be calculated accordingly."

packaged units inside the containers were to be considered the "package", resulting in a substantially bigger amount of indemnity.[147]

Both the first instance court and the Court of Appeal ruled in favour of the cargo owners, upholding their claim that it was not the containers but the packaged items inside that counted as "packages" for the purpose of the Hague Rules. These rulings, however, were based on different foundation and, although leading to the same outcome for the specific case, they would produce different results if their reasoning was applied to different circumstances. In particular, Colman J. firstly ruled that a container could not to be considered as the "package" solely because the carrier had been unable to verify the contents of the container, expressed by the "said to contain" clause on the face of the bill. The latter clause simply disqualified the shipper's statement in the B/L from being a *prima facie* evidence.[148] Thus, once the carrier signs a bill of lading, stating a number of container and a number of packaged items stuffed inside, the smaller packages are considered a "package" for the purpose of the Hague Rules. Moreover, if the packaged units inside the container contain even smaller packaged units, then it is the smallest consolidating item that qualifies for a "package" within the meaning of the Hague Rules.[149] Conversely, if the bill of lading does not describe packaged contents of the container or makes it unclear whether the goods inside the container are separately packed, then it is the container that qualifies as a "package".[150] Therefore, according to the approach upheld by the first instance court, the test whether a container is a package or not is the content of the bills of lading. Applying this reasoning to the facts in *The "River Gurara"*, the clause in the bill of lading, which considered containers as "packages", was null and void under Article III rule 8, because *"[its] only purpose is to achieve the very result which Art.III, rule 8 is there to prevent"*.[151] From this it follows that if a carrier wants to characterize the container as a package, then the shipment should be described in the bill of lading as "one container", whereas any clause which attempts to define the container as a package for the purpose of the Rules will be struck down by Article III rule 8 even if it was the shipper who stuffed the container.

The Court of Appeal upheld the decision but the reasoning of the Honourable Lords differed to a significant degree from the of the first-instance judge. Phillips L.J. did not accept the agreement of the parties, enshrined in the description on the face of the bill of lading, as a basis for determining what the relevant "package" is. Instead, because of the "said to contain" clause, the number of packages was dependant on whether a consignee could objectively prove the number of packages inside a container regardless whether this was described in the bill of lading.[152] In particular, Philips L.J. considered it erroneous to use the description in the bill of lading as a reference point whether the container is a package or not, because this would allow carriers to circumvent Hague Rules provision on limitation by describing the cargo in a way that

[147] By *'packaged units'*, the author of this thesis refers to any article of transport used to consolidate goods, and not to units that were individually packed.
[148] *The "River Gurara"*, [1996] 2 Lloyd's Law Reports 53, at p. 58.
[149] According to Colman J.'s approach, if, for example, a container is said to contain 20 pallets consisting of 80 cartons, then for the purpose of Article IV rule 5 of the Hague Rules there will be 80 packages and not 20 or 1.
[150] *The "River Gurara"*, [1996] 2 Lloyd's Law Reports 53, at p. 62.
[151] *The "River Gurara"*, [1996] 2 Lloyd's Law Reports 53, at p. 63.
[152] *The "River Gurara"* [1998] 1 Lloyd's Law Reports 225 at pp. 233-234.

constitutes the container as a package regardless of what actually it is inside. Thus, the approach by Colman J. was not upheld, and currently, under the Hague Rules, the number of packages depends on the actual content stowed inside the container and not on the number of packages and units as described in the bill of lading.

To sum up, the two decisions reached the same outcome – what constitutes a package within the meaning of the Rules are the smaller units that are larger numerically. However, these two decisions are very divergent if, in similar circumstances, there is no enumeration on the bill of lading of the packages inside the container. According to the approach of Colman J., the container will be considered the "package", whereas according to the view of Phillips L.J., the packaged items inside the container will constitute a "package" provided the consignee can objectively prove the number of packages that have been loaded inside the container.

A final important remark is necessary to be made on the bearing of the clause "said to contain" on the B/L statement about the container and the cargo inside. As observed in *The "River Gurara"*, this clause, if inserted, is a qualification of the statement about the quantity and quality of the containerized cargo. With regard to the application of the Hague or Hague-Visby Rules, such a clause will negate the effect of any statement or declaration concerning the contents of a container as a *prima facie* evidence vis-à-vis the shipper, or as a conclusive evidence vis-à-vis a third party bill of lading holder acting in good faith within the meaning of Article III rule 4 of the Hague-Visby Rules.[153] Also, the difference between the clauses "Said to Contain" (STC) and "Shippers Load, Stow and Count" (SLAC) is almost non-existent as to the effect they produce. While the STC clause designates that the cargo description in the B/L has been furnished by the shipper and the carrier has had no means of checking or verifying it, the SLAC clause indicates that the cargo has been packed and stowed into the container by the shipper as well as counted by him, with the carrier, again, not having any means of checking or verifying it. Therefore, the first clause is more focused on the quantity of cargo and the cargo itself, whereas the second clause stresses on the quantity and on how the cargo has been stowed inside the container.

In the Australian case *The "Esmeralda 1"*, a "said to contain" clause was found to strip the relevant declaration on the bill of lading from being a *prima facie* evidence as to the quantity of the cargo inside a container.[154] In this way, the clause precluded the defendant carriers from being estopped to deny vis-à-vis the consignee the stated quantity of units inside the container. On the facts, an FCL/FCL shipment of one container consisting of 437 boxes was packed and sealed by the shipper in Brazil, and upon opening the container by the consignee in Sydney, Australia, it was established that 118 of the boxes were missing due to pilferage. Being no longer a *prima facie* evidence, the declaration on the face of the bill of lading with regard to the quantity of the goods shipped, was refuted by documentary and external evidence which showed

[153] David A. Glass – *'Freight Forwarding and Multimodal Transport Contracts'* (2012), 2nd edition, para. 4.113, p. 443, fn. 339.
[154] *Ace Imports Pty. Ltd. v Companhia de Navegacao Lloyd Brasileiro (The "Esmeralda 1")*, [1998] 1 Lloyd's Law Reports 206.

that the missing cargo was stolen before the container was sealed by the shipper, and, accordingly, before it came into the custody of the carrier.[155]

4.2 The Hague-Visby Rules

An attempt for the more comprehensive regulation of containerized shipments at an international level was made in the 1968 Visby Protocol, which amended the original Hague Rules. The container clause in the Hague-Visby Rules is one of the major amendments to the original Hague Rules.[156] At the diplomatic conference for drafting the Protocol, it was even suggested by the Scandinavian delegations and the US delegation that Article IV rule 5 should be thoroughly altered so that the package limitation to the carrier's liability is removed and only the weight limitation is preserved for limiting the carrier's liability.[157] Eventually, this proposal was rejected and a compromise was reached to preserve the Article. The problem of conceptualizing containers was instead dealt with through a specific provision, which was absent in the original version of the Convention. Article IV rule 5(c) of the Visby Protocol establishes a straightforward rule stipulating under what circumstances a container shall be considered a "package" for the purpose of the Rules, or a consolidating unit:

> *Where a container, a pallet or similar article of transport is used to consolidate goods, the number of packages or units enumerated in the bill of lading as packed in such article of transport shall be deemed the number of packages or units for the purpose of this paragraph as far as these packages or units are concerned. Except as*

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[155] The documentary evidence that the court took into consideration were the stamped words *"said to contain – packed by shippers"* on the face of the bill, the words located in the margin of the bill *"particulars furnished by shipper of goods"*, the express statement *"[…] quantity [….] contents, if mentioned in this bill of lading, were furnished by the shippers and were not and could not be ascertained or checked by the Master"*, as well as the initials FCL/FCL. These were held to plainly demonstrate that the carrier neither stuffed and sealed the container, nor did he unseal and open it. It also showed that the carrier was relying on the shipper's representation as to the quantity of the goods stowed inside the container, and that the carrier could not check or verify the accuracy of that statement. Secondly, the physical evidence – an intact seal as well as items, not pertaining to the cargo and found inside the container (a torch with Brazilian batteries and a Brazilian underarm deodorant) – pointed to the fact that the container had been subject to pilferage before it was sealed by the shipper and before it came into the custody of the carrier. See: *The "Esmeralda 1"*, [1998] 1 Lloyd's Law Reports 206, at pp. 209-211.

[156] The other important amendments that the 1968 Visby Protocol brought, concerned the carrier's limitation of liability as well as the application of the Rules. First of all, the liability limitation was raised and fixed to the gold franc (Franc Poincaré), which substituted the 100 pound sterling limitation that had been previously introduced with the Hague Rules. Attached to the gold standard, the new liability limitation was thus no longer prone to inflation and currency fluctuations. Furthermore, besides the liability limitation levied per package or unit, a weight limitation was introduced as well, which allowed an alternative – 10,000 francs Poincaré per package or unit, or 30 francs Poincaré per kilo of gross weight, whichever was higher. However, with the 1979 SDR Protocol, the golden standard was eventually abandoned and replaced by the Special Drawing Rights (SDR). The other major amendment that the Visby Protocol brought was the revision of Article X, which was expanded with two additional possibilities to apply the Rules, and which in essence allowed the Rules to be applicable through a Clause Paramount even if they were not applicable *de jure*.

[157] Божидар Христов – *„Отговорност на морския превозвач при контейнерните превози"*, Библиотека „Българска търговско-промишлена палата" (БТПП), София (1977), сигнатура №105, стр. 16. [Bozhidar Hristov – *'The Responsibility of the Sea Carrier in Containerized Shipments'*, issued by the Library to the Bulgarian Chamber of Commerce and Industry (BCCI), Sofia (1977), signature №105, p. 16.] See also CMI – *'The Travaux Préparatoires Of The International Convention For The Unification Of Certain Rules Of Law Relating To Bills Of Lading Of 25 August 1924 The Hague Rules And Of The Protocols Of 23 February 1968 And 21 December 1979 The Hague-Visby Rules'*, pp. 546-561.

> *aforesaid such article of transport shall be considered the package or unit.*

In other words, if the packages within the containers are enumerated on the face of the bill of lading, then these are considered the numbers of packages, and if they are not – it is the container that is the package within the meaning of the Rules. The approach enshrined in this Visby provision resembles the view of Colman J. in *The "River Gurara"*. It is submitted that the enumeration for the purpose of Article IV rule 5 (c) will be valid even when the number of packages is qualified by a "said to contain" (stc) clause, and this will certainly be the case if the carrier has modified the freight rate as a result of such enumeration.[158] Thus, one has to look solely at the shipping document in order to establish whether the container is a package or a consolidating unit, regardless of who has stuffed the container. However the question of who has packed the container will not lose significance because it remains vital for the evidentiary burden and for adducing evidence in parallel to the facts stated in the bills of lading.

Therefore, in the presence of an enumeration of the packages within a container, any clause which attempts to define the container as a package, such as the clause in *The "River Gurara"*, will be held null and void under Article III rule 8.

Two notions need to be clarified with regard to the wording of Article IV rule 5 (c), and these are the meaning of the words "enumerated" and "as packed". In the Australian case *El Greco*, enumeration is submitted to be numbers on the face of the bill of lading regardless whether these numbers are expressed in words or through digits.[159] The enumeration on the face of the bill of lading must give a clear indication of the number of packages or "units as packed", or, otherwise, in case it cannot be established what numbers of packages or units are packed in the container, the latter will be considered the package.[160] Thus, if there is no sufficiently clear enumeration, a container will be viewed as a package and, in that sense, as part of the cargo; conversely, if the "packages" or "units as packed" are enumerated on the bill of lading, the container will be considered as an article of transport consolidating the goods and, in that sense, as part of the ship.[161] Therefore, it can be presumed that under the Hague and Hague-Visby Rules containers are viewed as a concept that has a dual nature.

Then, Article IV rule 5(c) presents a further issue – what exactly is to be enumerated in the B/L box "Description of cargo/Number of packages" in order for a container not to be considered a "package", or vice versa as the case may be? Obviously, an enumeration of a specified number of pallets, crates, cartons, bales, bundles, parcels or bags easily qualifies for a package. But where should the line be drawn between a package (*i.e.* a packed unit) and a loose unit? As mentioned, the Rules refer to "packages" or "units as packed". The presence of the word "unit" (which existed in the 1924 Hague Rules package limitation as well) is explained with the need to clarify the rule laid down

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[158] See: Simon Baughen – *'Shipping Law'*, 6th edition (2015), p. 125, fn. 200; John F. Wilson – *'Carriage of Goods by Sea'*, 7th edition (2010), p. 200; *The "River Gurara"* [1998] 1 Lloyd's Law Reports 225, at p. 234, Phillips L.J.

[159] *El Greco v Mediterranean Shipping Company*, [2004] 2 Lloyd's Law Reports 537, at p. 583, para. 263.

[160] *El Greco v Mediterranean Shipping Company*, [2004] 2 Lloyd's Law Reports 537, at p. 586, para. 284.

[161] *El Greco v Mediterranean Shipping Company*, [2004] 2 Lloyd's Law Reports 537, at p. 586, para. 280 and 282.

in Art IV r. 5(c), and it is not considered as a proviso or a qualification to that rule.[162] Allsop J. held that the addition of the word prevented any future disputes with regard to the extent and nature of the wrapping and the packaging material so that the rule would cover even unpackaged and unboxed articles as long as these are packed together. The rule does not cover, however, loose articles or individual pieces.[163] These individual loose articles must be packed in order to qualify for a "package" within the meaning of the Hague-Visby Rules.[164] The approach in Article IV rule 5(c) provides a clear-cut solution to the problem that under certain circumstances can seem strange – for example, "1 container said to contain 50 televisions" will be considered 1 package only, while "1 container said to contain 50 televisions in boxes" would be 50 packages, although television sets are in practice always carried in boxes.

So the subtle question that follows is where one can draw the line between a shipment consisting of a certain number of packages within a container and a shipment consisting of individual pieces of cargo stowed in the container. In *Bekol B.V. v Terracina Shipping Corporation*,[165] which was the only English court decision to discuss the notion of a "package" until *The "River Gurara"*, Leggatt J. held that in order for individual pieces to be considered as a package, they have to be either packed up in a receptacle, or compactly tied up together.[166] For example, while individual pieces of timber will be considered articles when carried loose, the same will no longer be considered individual articles of cargo when they are lashed together with straps. In this case they will turn into a "package" for the purpose of the Rules. Furthermore, stacking units or items does not form a package within the meaning of the Rules.[167]

To summarize, the container clause introduced in the Hague-Visby Rules follows the approach of the first instance court in *The "River Gurara"* (Colman J.), which is of the position that the decisive factor in determining whether a container is a package or not is what is indicated on the bill of lading. Furthermore, courts have interpreted this provision to the effect that in order to distinguish a package (a unit as packed) from a loose unit, the packed units must be stated in the bill of lading as units as packed (*e.g.* 50 TV sets in boxes) if these units are to be considered a package for the purpose of limitation. Additionally, even unpacked units, when tied or lashed together, may form a package if they are described so in the bills of lading. That being clarified, it is worth pointing to the advantages and shortcomings of the container clause in today's practice.

To begin with, the provision in Article IV rule 5(c) has two distinctive advantages over the earlier attempts, under the Hague Rules, to characterize the container as a package or not. First of all, with regard to bill of lading holders, one has to simply look at the shipping document in order to establish whether the containerized cargo is a single package, or whether the container holds numerous packages as understood under the Rules. This way, a prudent third party bill of lading owner can easily assess the risks

[162] *El Greco v Mediterranean Shipping Company*, [2004] 2 Lloyd's Law Reports 537, at p. 585, para. 278.
[163] *El Greco v Mediterranean Shipping Company*, [2004] 2 Lloyd's Law Reports 537, at p. 585, para. 279.
[164] *El Greco v Mediterranean Shipping Company*, [2004] 2 Lloyd's Law Reports 537, at p. 586, para. 282.
[165] *Bekol B.V. v Terracina Shipping Corporation*, 13 July 1988 (unreported), where Leggatt J. considered the concept of "package".
[166] David A. Glass – *'Freight Forwarding and Multimodal Transport Contracts'* (2nd edition), Informa Law from Routledge (2012), p. 456.
[167] *Mitsui & Co., Ltd. v American Export Lines, Inc.*, U.S. Court of Appeals for the Second Circuit (1981), 636 F.2d 807.

pertaining to the respective shipment. Also, by attaching the contents of the container to the information in the bill of lading, in the sense that the contents of the container as described in the bill of lading is not modified by the surrounding circumstances, uniformity and certainty are promoted.

Secondly, with regard to carriers and shippers, these parties are thus given freedom in their contract of carriage to choose between themselves how the containerized shipment will be characterized – as a single package or as a certain number of packages stowed inside a shipping container.[168] Obviously, if there is no enumeration of packages inside a container, and the metal box is considered the package, then it is most likely that the limitation of liability will be calculated per gross weight (2 units of account per kilo) instead of per package (666.67 SDR per package) because in most instances the former will be the higher.[169] This is eloquently summarized by K. Diplock L.J. at the 7th Plenary Session on 22 February 1968 during the negotiations and drafting of the Visby Protocol: *"A container is a package which may contain other packages. It may contain for example 100 crates of various kinds of merchandise. The problem is where you have a container which contains inside it other traditional packages or units, is the liability going to be calculated upon the container as the package, which would almost certainly involve the weight basis, or is it to be calculated on the individual packages within the container as if they were stowed in the traditional way in the hold? […] It is for the shipper and the carrier to decide whether they want the particular container to be treated as the package for the purpose of limitation of weight, or whether they want the smaller packages or units in it to be so treated; and no doubt when the latter alternative is taken, that is to say the individual packages are to be treated as separate units, a higher rate of freight will be payable than when the container is to be the unit – a higher rate of freight because the maximum liability, may itself be higher. A very simple answer then: it is for the parties to the contract of carriage to decide what shall be the unit."*[170] This proposition that dates back to the late 1960s is still supported by authors today, namely that case law does not point to a definitive answer whether a container is part of the vessel but it is rather the construction of the particular bill of lading which will give the correct answer.[171] In other words, there is no general rule as to the status of the container, whereas the proper interpretation of the contract of carriage as well as of the facts will determine the status of the container and type of vessel.[172]

The container clause, however, has one fundamental problem, at least when it comes to limitation of liability. By making the description on the bill of lading the decisive factor, Article IV rule 5(c) renders the rules on limitation in that same article

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[168] The carrier, however, can decide not to enumerate packages within a container only if entitled by Article III rule 3, according to which he has an obligation to issue to the shipper a bill of lading, containing specific cargo-related details and information about the shipment.

[169] See: Article IV rule 5 (a) of the Hague-Visby Rules.

[170] CMI – *'The Travaux Préparatoires Of The International Convention For The Unification Of Certain Rules Of Law Relating To Bills Of Lading Of 25 August 1924 The Hague Rules And Of The Protocols Of 23 February 1968 And 21 December 1979 The Hague-Visby Rules'*, p. 570.

[171] See: N.J. Margetson – *'Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers'*, (2008) JIML 14, pp. 153-161, at p. 157. Margetson has reached an interesting conclusion that a container is neither part of a vessel, nor part of the cargo's packaging but it is rather a *sui generis* concept.

[172] For example, containers that belong to open-top (*e.g.* fully cellular, deckless) container vessel are likely to be considered as part of the vessel.

not that significant. As pointed out by Prof. E. Røsæg, the number of packages mentioned in the bill of lading becomes a more important issue than the limitation amounts itself.[173] Therefore, the container clause opens the door to contracting parties, although not that apparently, to get outside the grip of the Rules by deciding themselves what will be considered a package through the cargo description on the bill of lading. Again, that goes to show that the introduction of containers has stirred the balance between cargo interests and carrier interests as established with the 1924 Convention, among whose major goals is safeguarding the weaker party.

5. The period of responsibility of the carrier under the Hague-Visby Rules and the carriage of containers

5.1 Modification of the traditional contractual model

Besides the social, economic, and technical aspects of the impact that containerization caused to the modern world of shipping and logistics,[174] this means of carriage also brought about changes to the traditional model of the contract of carriage. The often straightforward and express contractual relationship between a shipper and a carrier, evidenced in an ocean bill of lading, has been modified by this new concept of transportation that shipping containers brought. The main element of these contractual changes is that use of containers extended the traditional contractual service and took it beyond the traditional sea carriage service. The so called *tackle-to-tackle* rule, typical of the Hague and Hague-Visby Rules, is no longer decisive for determining the period of responsibility of a sea carrier since containerized goods may be often transhipped, stored into a warehouse before being loaded or after being discharged and prior to delivery to the consignee, or they may be carried via different modes of transport such as road, rail or air, which could take place both before and after the sea leg of the journey. In many of these cases, the carrier's period of responsibility may be extended to periods of time that precede or follow the sea carriage, while the goods are not actually aboard the vessel. Thus, the introduction of containerized transport has brought in new problems associated with the application of maritime legislation to carriage that may not be exclusively maritime.

However, unlike the discussions in *Chapter IV* above, many of which were centred around whether a specified matter fell within the scope of the Hague-Visby Rules or not, the problems arising out of containerized carriage are subject to and dealt with by the Rules. It has to be conceded, though, that the Rules were drafted in a period when containers were not involved in international trade, and, therefore, did not fully address this type of carriage. Yet, the extension of the contractual service beyond the sea carriage does not run contrary to the Hague-Visby Rules. Article VII of both the Hague Rules and the Hague-Visby Rules retains the carrier's and shipper's right to agree on

[173] Erik Røsæg – *"Implementation of the Rotterdam Rules in Norway"*, Scandinavian Institute of Maritime Law Yearbook (SIMPLY) 2014, pp. 49-108, at p. 58.
[174] See: *section 2* and *section 3* above.

contractual terms that extend the carrier's period of responsibility.[175] This, in fact, can happen quite often as there is currently no international multimodal convention to govern solely such carriage. When it comes to the applicability of the Rules to multimodal transport, an essential factor is the issuance of a bill of lading or a similar document of title because their scope of application depends on the latter.[176] A very interesting comment made by the Dutch scholar Marian Hoeks refers to the nature of such multimodal (combined transport) bills of lading and points to the fact that they may not have all the features of a bill of lading as explained in *Chapter I* of the current thesis. While there is no dispute that such bills evidence the receipt of the goods and evidence the contract of carriage, their function as a document of title may be compromised where the predominant component of the multimodal transport is not the sea carriage.[177] The rationale behind such doubts is that a bill of lading cannot be a document of title, in the sense that it confers constructive possession in the goods it refers to, if these goods are in most of the time no in the physical possession of the contractual multimodal carrier.[178] In the opinion of the author of the present thesis, however, what matters for the transfer of constructive possession is not the physical possession of the goods but rather the capacity to control the movement of the goods and their delivery under the contract of carriage in a way so that the party vested with constructive possession assumes a legal position as if he is a party with actual possession.

In essence, there are two main types of expanded contracts with regard to the carriage of containers, and these will be thoroughly discussed below. In the first case, a through bill of lading is issued by a principal carrier, which will usually contain a transhipment clause.[179] In the second case, the contract of carriage will be evidenced by a combined transport bill of lading issued by a carrier or a freight forwarder and it will provide that the carrier or freight forwarder, as the case may be, will be responsible for the entire journey including the non-maritime legs of the carriage.

5.2 The carrier's period of responsibility under a through B/L and a combined B/L

Traditionally, transport that takes place in several stages – whether only by sea (transhipment) or by several modes of transport (multimodal) – is covered by a multi-stage bill, which can be of two main types: through bills of lading and combined transport bills of lading.[180]

Very often the transport of containers will involve two or more successive carriers, which requires the issue of a through bill of lading. This bill has two broad categories.

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[175] Hague-Visby Rules, Article VII: *"Nothing herein contained shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to the discharge from, the ship on which the goods are carried by sea."*

[176] Marian Hoeks – *'Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods'*, Kluwer law International (2010), ISBN 978-90-411-3246-8, Chapter 3, at p. 105.

[177] Marian Hoeks – *'Multimodal Transport Law: The law applicable to the multimodal contract for the carriage of goods'*, Kluwer law International (2010), ISBN 978-90-411-3246-8, Chapter 8, at pp. 252-253.

[178] *Ibid.*

[179] S. Baughen – *'Shipping Law'*, 4th edition (2009), p.13.

[180] Richard Aikens, Richard Lord, Michael Bools – *'Bills of Lading'*, Informa Law (2006), p. 314, para 11.7.

Depending on the terms of the bill of lading and the underlying background and factual matrix, the principal carrier who issued the bill may be responsible for the entire carriage from the point of receipt through and up to the point of delivery, or each carrier may be responsible for the particular period during which the cargo is in his custody. In the former, case the carrier issuing the bill of lading contracts for the entire journey as a principal with the shipper, and the carrier's obligations towards the shipper remain under the contractual terms even after transhipment takes place to a vessel, to which the principal carrier has sub-contracted the relevant stage of the carriage. In the latter case, the through bill of lading will provide that the carrier will act as a principal only for that part of the sea journey which he personally performs, meaning that the carrier's responsibility is confined to the period within which the goods are in his custody, whereas for the other sea stages of the journey he is acting only as an agent of the shipper when contracting with other sea carriers to perform their relevant stage.[181]

If the successive carriages, however, involve more than one mode of transport, then a combined bill of lading is issued, which is also known as a combined transport bill of lading or a multimodal transport document. Issued by a carrier or by a freight forwarder,[182] the combined bills of lading usually contain a term specifying that the carrier or freight forwarder will be responsible for the door-to-door delivery of the goods. Thus, the carrier issuing the bill will act as a principal for the entire contractual service, although he may subcontract one or more (non-maritime) parts of the voyage to other carriers. The successive air, road, rail, or sea carriers are considered subcontractors and agents of the principal carrier or freight forwarder who issued the combined bill of lading and whose responsibility and liability under the contract of carriage cover the entire journey comprising all modes of transportation.

The principal carrier's responsibilities and liabilities will be governed by the law of the place where the loss or damage occurred and of the law applicable to the mode of transport that was being used at that time.[183] Naturally, the sea carrier's responsibilities and liabilities will be governed by the Hague-Visby Rules (or by another applicable maritime liability regime) for the sea leg of the combined carriage.[184] The other legs of the journey will be governed by the relevant mandatory unimodal transport convention, each of which embodies a different liability regime.[185]

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[181] John F. Wilson – *'Carriage of Goods by Sea'*, 7th edition (2010), p. 6; S. Baughen – *'Shipping Law'*, 4th edition (2009), p.13.

[182] If the combined bill of lading is issued by a party that is neither the shipowner nor the charterer (*e.g.* a freight forwarder), then the bills will be a *"received for shipment"* bills of lading.

[183] John F. Wilson – *'Carriage of Goods by Sea'*, 7th edition (2010), p. 6.

[184] For the alternative approach taken by the Rotterdam Rules, which is a *'maritime plus'* convention, see section 8 below.

[185] For instance, the Warsaw Convention (1929) regulates international air carriage; the COTIF/CIM Convention regulates international railway carriage (1980), and the CMR Convention (1956) regulates international road carriage. All these conventions require an international element in the carriage of the goods, which means that they will apply in the vast majority of carriages in Europe – a continent that is abundant in geographically relatively small countries with booming economies, which presupposes significant export and import. Outside Europe, however, and especially when no national boundaries are crossed, very often these conventions are not applicable, and then the respective national law will apply or, in case no convention or national law is applicable, the agreement between the parties as expressed in the contract of carriage (*e.g.* the incorporation of the ICC Rules for a Combined Transport Document) will apply subject to the interpretation of the court. The parties may even agree to extend the application of a convention to the remainder of the carriage in order to achieve uniform liability rules. Thus, the Hague-

Having clarified the two major contractual arrangements in the container trade, it is worth emphasizing that there is not always much value in scrutinizing exact definitions alone unless their meaning is applied to the concrete terms of the contract of carriage. Although the distinctions between the various kinds of bills of lading have legal importance, which affects the rights and obligations under the particular bill, some definitions of bills of lading may have only a commercial and descriptive significance for the particular trade. In modern container shipping, in particular, bills of lading are drafted in an interchangeable form and they contain terms that can cover various types of carriage – either a port-to-port carriage, or a through carriage, or a combined transport carriage.[186] Furthermore, the through bills of lading have often a loose meaning and there can be different types of such bills of lading. They can, for example, contain and evidence a contract of carriage that covers more than one mode of transport as long as at least one of the legs is a conventional sea carriage, which could also be performed by various sea carriers via a process of transhipment.[187] Thus, very often what matters for determining the carriers period of responsibility is the contents and substance of the bill of lading rather the its name and form.

It has to be noted, however, that in practice freight forwarders, when acting as shipper's agents in contracting with separate carriers, often exclude their personal liability for damaged or lost cargo during transhipment from one stage to another, which translates into the cargo owner assuming the risk.[188] This is usually done by inserting in the through bill of lading a clause, saying *"transhipment at shipper's risk"*. Therefore, it is difficult to draw general rules and principles that are directly applicable to the sea carrier's period of responsibility. Instead, the relevant clauses in the through bills of lading must be the guiding marks in assessing the period when the carrier's obligations are owed.

An important terminological differentiation that has to be taken into account when combined transport is involved, is the difference between intermodal shipping and multimodal shipping. As is the case with through B/L and combined B/L, both terms have more commercial than legal significance. However, they are not interchangeable despite the fact that they look similar. Intermodal carriage designates transportation of cargo, which involves several modes of transport and multiple transport providers, with each of which the shipper signs a separate and independent contract of carriage for the single journey. With regard, to the sea leg, the sea carrier will usually issue a port-to-port bill of lading and will be responsible only for that part of the journey.

Multimodal carriage, on the other hand, describes a similar arrangement but in this case the different transport providers operate under a single contract of carriage. That is, in a multimodal carriage, the combined transport operator (a principal carrier or a freight forwarder) will issue a combined transport bill of lading and will operate under

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Visby Rules, or a part thereof, may be applicable before and after the maritime leg of the journey. Most often, however, the amount of liability is dependent on locating the place where the goods were damaged or lost if such a place is ascertainable, and it will be the respective unimodal convention or national law which will govern the carrier's liability.

[186] John F. Wilson – *'Carriage of Goods by Sea'*, 7th edition (2010), p. 253.

[187] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'* (20th edition), Sweet & Maxwell (1996), p. 369, Article 180.

[188] John F. Wilson – *'Carriage of Goods by Sea'*, 7th edition (2010), p. 253.

one contract of carriage on a door-to-door basis, and he will be solely liable for damaged or lost cargo throughout the whole journey. In this case, as mentioned above, the combined transport operator will negotiate separate contracts with various unimodal carriers but there will not be a contractual link between these actual carriers and the cargo owners.

5.3 Contractual terms designating the container service

When the principal carrier or freight forwarder issues a multimodal transport document, the latter will designate whether the period of responsibility stretches door-to-door or from door to Container Yard (CY) or Container Freight Station (CFS), or from CY or CFS to door. In other words, the period of responsibility is dependent upon the type of service offered to the clients of the shipping line or container operator.

Generally, there are two types of container services, namely Full Container Load (FCL) and Less than Container Load (LCL), which are also known as movement codes, and they determine the terms on which a container is made available. FCL designates that the full capacity of the container will be used by a single cargo owner, and in this case it is usually the cargo interests (shipper and consignee) who pack and unpack the container, respectively. The container may be owned by the carrier or by the shipper but more often it is the carrier who supplies containers to their clients.[189] In this case, the carrier will deliver an empty container to the shipper's premises, whereas the responsibility for packing and unpacking, as well as the pertaining liability, rests with the cargo interests. Then the fully stuffed container will be taken from the shipper's premises to the sea carrier's depot. The inland carriage to the carrier's depot, known as the pre-carriage, will be taken care of either by the carrier (carrier's haulage), which will be the case under an 'FCL door' contract, or by the shipper (merchant's haulage) if the contract is 'FCL depot'.[190] The same stipulations apply for the on-carriage, namely the inland carriage from terminal to door after the container has been picked from the port, in accordance with the specific contractual term found in the bill of lading.

LCL, on the other hand, indicates that the space in the container is used for the transportation of various cargoes, owned by multiple shippers and consignees. It is the shipping line, in this case, that is responsible and held liable for packing the container and for the subsequent unpacking. Under LCL terms, the shippers usually bring their cargo to the shipping line's packing station, known as the Container Freight Station (CFS), where the shipping line will pack the cargo of several shippers and stuff it into a container.

A service similar to LCL is called Groupage, where cargo of multiple shippers is also packed in one container with the only difference that this is done not by the shipping line but by a Groupage operator. The Groupage operator will book a container with the shipping line and will issue his own house bill of lading to the cargo interests, while obtaining the master bill of lading from the carrier. Therefore, LCL shipments are consolidated by the shipping line (the carrier), whereas Groupage shipments are

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[189] S. Baughen – *'Shipping Law'*, 6th edition (2015), p. 14; Talal Aladwani – *'The Supply of Containers and "Seaworthiness" – The Rotterdam Rules Perspective'*, 42 JMARLC 185, at p. 187. Also, see *The "Aegis Spirit"*, [1977] 1 Lloyd's Law Reports 93, at p.98.

[190] S. Baughen – *'Shipping Law'*, 6th edition (2015), p.13 (*ibid.*)

consolidated by a consolidator (the Groupage operator). In the former case, no house bills of lading will be involved.

In the containerized trade, the FCL and LCL are often inserted as terms of the contract of carriage. The two terms can be used in a combination depending on the situation and on the needs of the client. FCL/FCL stands for one shipper and one consignee, where the cargo is packed in the container by the shipper in his premises and, likewise, unpacked by the consignee. Very often, however, the arrangements for packing of the container are different from the arrangements for the equivalent operation that takes place when the ship has arrived the port of destination.

Thus, FCL/LCL indicates that there is one shipper but multiply consignees, meaning that the container will be packed in the container by a single shipper in the shipper's premises but the container will be then unpacked at the CFS by the shipping line.

Similarly, LCL/FCL shows that there are multiple shippers who deliver their cargo at the CFS to be packed by the shipping line but there is only one consignee to receive the cargo in the container, and thus the container is unpacked in the consignee's premises.

As explained, LCL/LCL describes a situation where a container is packed with goods from multiple shippers and destined to multiple consignees. In this case, the container is packed and unpacked by the shipping line in its CFS.

These terms are also used in combination with the words "door", "depot" or "port" in order to describe the movement of the container.[191] For example, the bill of lading notation FCL door/LCL depot will denote a situation where the carrier will provide an empty FCL container to the shipper's premises, where the container will be packed by the shipper, and then the stuffed FCL will be taken to the carrier's Container Freight Station (CFS) on a carrier's haulage basis (the haulier is a sub-contractor of the carrier). From there, the FCL container will proceed by sea to its destination – the CFS in the import country, where the container will be opened and unpacked, and where delivery will take place. For comparison, a LCL door/LCL depot annotation will describe a similar movement with the exception that the carrier initially does not provide an empty FCL container to the shipper but instead collects the uncontainerized cargo from the shipper and takes it to the CFS for consolidation and stowing into the container. Under FCL port/LCL depot terms, the stuffed FCL container will be delivered by the shipper aside the vessel at the port of loading (on a merchant's haulage basis), and then in the import country the container will be unpacked by the carrier's agents at the CFS where delivery to the consignee on an LCL basis will take place. If the B/L annotation is FCL port/FCL depot, then, after the sea carriage, the FCL container will be delivered at the CFS to the consignee, who will then take it to his premises where the FCL container will be opened and unpacked. In that case, the FCL container may well be provided either by the carrier or by the shipper. Therefore, the empty container is eventually returned back to the carrier's CFS in the import country or elsewhere if the parties so agreed. These latter examples illustrate that the FCL and LCL terms, designating the contractual service,

[191] See: Paul M. Bugden and Simone Lamont-Black – *'Goods in Transit and Freight Forwarding'* (2nd edition), Thomas Reuters (1999), Chapter 18: Containers, p. 371, para. 18-01.

define the period of responsibility of the carrier but they do not, however, provide information as to which party has provided the container.

Furthermore, there are additional delivery terms, which designate where the carrier's contractual obligations start and where they cease. These are CY/CY, CY/CFS, CFS/CY, and CFS/CFS. Although they sound similar, there is a significant difference between the two notions. The Container Yard (CY) is simply the area in a port or in a container terminal where containers are stored either before being loaded on a vessel, or after having been unloaded from her. The Container Freight Station (CFS), on the other hand, is the warehouse where cargo owned by various exporters or importers is consolidated upon export or deconsolidated upon import, either by the shipping line or by a Groupage operator.

Therefore, CY/CY means that there is one FCL shipper at the port of loading and one FCL consignee at the port of discharge, while the contractual obligations of the carrier are on a port-to-port basis that is, they begin and end at the respective container yard of the named ports (*e.g.* Hamburg CY/Rotterdam CY).

Bills of lading with a notation CY/CFS indicate that there is one FCL shipper at the port of loading and multiple LCL consignees at the port of discharge. While the carrier's responsibility begins at container yard at the port of loading, it ends at the container freight station at the port of discharge.

Similarly, CFS/CY shows that there are multiple LCL shippers at the port of loading and one FCL consignee at the port of discharge. Accordingly, the carrier's responsibility begins at the container freight station at the port of loading and ends at the container yard at the port of discharge.

With regard to CFS/CFS terms, it is worth noting that, although they designate that the period of responsibility commences and ends at the container freight station at the port of loading and discharge, respectively, there is a difference in the case of LCL shipments as opposed to Groupage shipments. Under LCL shipments, it is the shipping line that is held responsible and the contract of carriage will be evidenced by the line's bills of lading. In the case of Groupage shipments, however, it is the Groupage operator (the consolidator) who is responsible vis-à-vis the cargo owners, and the contract of carriage is evidenced by the House bills of lading issued by him. The shipping line in this case will be held responsible vis-à-vis the Groupage operator, and the Master bills of lading issued by the shipping line to the consolidator will have CY/CY terms.

Again, like FCL and LCL terms, CY and CFS terms also do not designate the party that owns or has provided the container but are focused on the period of responsibility of the carrier. On the other hand, the difference between those terms, very simplified, is that the FCL and LCL terms are more centred around *what* is going to be transported, while the CY and CFS terms are rather focused on the *where* the cargo will be carried, meaning that the latter terms bear geographical significance.

6. "Properly and carefully load, handle, stow, carry, keep, care for and discharge" applied to containerized cargo

6.1 Article III rule 2 applied to containers

When taking into account the obligations of the carrier over containerized cargo, it should be underlined that the Hague Rules were elaborated and drafted at a time when container shipments by sea were completely unknown. Naturally, the provisions of the 1924 Convention are directed at regulating the carrier's obligations and liability over cargo which was common at the time – bulk cargo and break bulk cargo. This is considered to be the main reason why difficulties arise when the Rules are applied to the specific character of containerized shipments.[192] These difficulties are manifested by the fact that the liability of the carrier with regard to fulfilling his obligations to provide suitable and cargoworthy containers is determined differently under different legal systems.[193]

In considering who is responsible for the fitness and suitability of the containers, in which the goods are carried, a central role plays the fact who has supplied those containers.[194] As observed in *section 5.3* above, under an LCL shipment, it is the carrier who provides the container, and thus it is fairly easy to conclude that the responsibility for that container stays with him.

However, in an FCL shipment, although it is always the shipper who will pack and stow the goods inside the box, the container can be provided either by the shipper, or by the carrier who would supply an empty container to the shipper.

In the first instance, when the shipper supplies the container, it is his responsibility to provide a suitable and fit container. However, it should be noted that when shipper-supplied containers have visible external defects, the carrier may still be held responsible for not rectifying or improving these deficiencies if they lead to cargo damage or loss.[195] That is why carriers are advised to dispose with a system for spotting unfit containers.[196] Furthermore, when the container is provided by the shipper, he will either supply its own container or one that was borrowed, rented, or leased from a third

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[192] Божидар Христов – *„Отговорност на морския превозвач при контейнерните превози"*, Библиотека „Българска търговско-промишлена палата" (БТТП), София (1977), сигнатура №105, стр. 3-4. [Bozhidar Hristov – *'The Responsibility of the Sea Carrier in Containerized Shipments'*, issued by the Library to the Bulgarian Chamber of Commerce and Industry (BCCI), Sofia (1977), signature №105, pp. 3-4.]

[193] N.J. Margetson – *'Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers'*, (2008) JIML 14, pp. 153-161, at p. 153.

[194] Alexander von Ziegler – *'Haftungsgrundlage im internationalen Seefrachtrecht'* [*'Liability Basis in International Maritime Law'*], Schulthess (2002), at pp. 99-100: *„Bei Gütern, die in Containern befördert werden, stellt sich die Frage, inwieweit der Seefrachtführer auch für die See- und Ladungstüchtigkeit der Ladebehälter (Container) verantwortlich ist. Die Beantwortung dieser Frage hängt massgeblich davon ab, wer diese Container dem Ablader zur Verfügung stellt. Bei LCL-Containern ist dies wohl stets der Seefrachtführer, während es bei FCL-Containern darauf ankommen wird, ob es der Seefrachtführer war, der den Container dem Ablader zur Stauung überlassen hat."* ["When goods are carried in containers, the question arises to what extent the sea carrier is also responsible for the sea- and cargoworthiness of the containers. The answer to this question depends largely on who provides these containers to the shipper. In LCL shipments, this is probably always the carrier, while in FCL shipments it depends on whether it was the carrier who left the container to the shipper for stowage."]

[195] Paul M. Bugden and Simone Lamont-Black – *'Goods in Transit and Freight Forwarding'* (2nd edition), Thomas Reuters (1999), Chapter 18: Containers, p.373, para. 18-05.

[196] Gard – *'Container carriage: a selection of articles previously published by Gard AS'*, July 2014, at p. 4.

party. In both cases, the shipper is using the container as packaging of the goods and this is substantiated by the fact that, in practice, transport companies are held liable not only for damage to the cargo inside the container but also for material damage to the container itself under the corresponding carriage conditions.[197] Therefore, when assessing the amount of liability, the gross weight of the shipment is calculated, meaning the total weight of the cargo plus the weight of the container.[198] In fact, when shipper-supplied containers are carried (this is usually the case with tank containers), those are considered goods (*i.e.* part of the cargo) regardless whether there is cargo inside them or not.[199] Therefore, if such containers are lost or damaged, the carrier will be held liable with respect to those containers apart from other liability that may arise with regard to any cargo damage. Interestingly, with regard to damage to shipper-supplied containers, a carrier could be exposed to "unlimited" liability although, in principle, he may have under the Hague-Visby Rules the right to limit. This is so because of the relevant provisions of the Rules coupled with the specific characteristics of shipping containers, which were already laid down in *section 3*. Thus, in such a case, the higher weight limitation under Article IV rule 2(a) will apply, and considering the fact that an average container weighs about 2 tons, the liability limitation will be around 4,000 SDR, which well exceeds the average market price of a shipping container.[200] So, with the exception of some refrigerated containers which may have extremely expensive equipment, most merchant-supplied containers that a carrier uses as a bailee, will in effect not fall under the umbrella of the weight limitation provisions of the Rules. It must be conceded, however, that in practice most often the shipping containers are provided by the carrier who either owns them or has leased them.[201]

This leads to the second instance mentioned hereinabove, namely, when the carrier supplies an empty FCL to the shipper. In this case, the carrier remains responsible under the Hague/Hague-Visby Rules to provide a suitable container that is fit for the intended journey. The container should be in a good condition an all pertaining systems, such as a refrigerating system on a reefer container, should be operational and in good working order.[202] Reefers, for example, undergo a pre-trip inspection before they are released to the cargo owners in order to ensure that the temperature unit of the container is functioning properly and to establish whether there is any structural damage.

To sum up, the general rule is that regardless of which party stuffs the container, or, in other words, regardless whether it is an FCL or an LCL shipment, when it is the carrier to supply a container, it is his duty to provide a container in good order and

[197] German Insurance Association (GDV) – *'Container Handbook'* (2012), section 1.4.4.1 Container provided by shipper.
[198] German Insurance Association (GDV) – *'Container Handbook'* (2012), section 1.4.4.1 Container provided by shipper (*ibid.*).
[199] Paul M. Bugden and Simone Lamont-Black – *'Goods in Transit and Freight Forwarding'* (2nd edition), Thomas Reuters (1999), Chapter 18: Containers, p.373, para. 18-05. (*ibid.*)
[200] According to 2016 exchange rates, 4,000 SDR equals about 5,100 EUR or about 5,500 USD, while the price of a shipping container varies between 2,000 and 4,000 USD.
[201] Paul M. Bugden and Simone Lamont-Black – *'Goods in Transit and Freight Forwarding'* (2nd edition), Thomas Reuters (1999), Chapter 18: Containers, p. 374, para. 18-09.
[202] Gard – *'Container carriage: a selection of articles previously published by Gard AS'*, July 2014, at p. 4.

condition.[203] Furthermore, the fact that the shipper has been granted the opportunity to examine the container before shipment does not negate this duty of the carrier.[204] The container must be fit for the intended carriage, and any damage or loss of cargo which results from a faulty container supplied by the carrier is considered breach of either Article III rule 1 or Article III rule 2. What is more, as mentioned above, even in the case when the FCL container is provided by the shipper, the carrier may still be found liable for breach of Article III rule 2 if he accepts a container in a manifestly poor state and does not make any reservations on the bill of lading.[205]

When the containerized cargo has been damaged or lost due to a defect of the laden container, the carrier may be held liable either for breach of his seaworthiness obligation (Art.III r.1) or for breach of his duty of care (Art.III r.2), mainly depending on the circumstances of the case and, in particular, on whether the container is considered part of the vessel or part of the cargo. The US case *The "Red Jacket"*,[206] held by the Southern District of New York, is a good example of the interplay between the two duties. The defendant carrier was transporting cargo of ingots stowed in 50 containers on board the steamship *Red Jacket*. An accident took place *en route* during a heavy winter storm in the Northern Pacific, which, although very harsh, was not unexpected in the particular area for that part of year.[207] One specific, allegedly faulty, container which was eight years old and had already been on 20 to 30 voyages, was supplied by the carrier to the shipper on an FCL house-to-house basis, and it was established that this container was the cause for the disaster. The integrity of the container was compromised during the storm and this led to a domino effect causing the collapse of an entire stow of 50 containers located on deck.[208] As a result, 43 of the containers were swept overboard and the remaining 7 were damaged.

The Court established that the cargo was stowed inside the container in a negligent manner by the shipper. The ingots were alleged to be stowed unsecured and in a loose manner, which allowed them to move and to repeatedly strike the base of the left corner-post of the container (a weight bearing element of any container). Because of that, the post separated from the container and the container's whole left wall collapsed.[209] However, the Court did not find enough evidence to support the argument that the shipper's improper and negligent stowage constituted the proximate cause for the accident because there were ingots in other containers as well that were stowed even more poorly.[210] Instead, the carrier-supplied container was found to be unseaworthy and not fit for the intended voyage because it had evident major structural damage visible to the carrier before the beginning of the journey. Thus, the carrier's negligence to permit this old and weakened container to be loaded on board the vessel was found to be the

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[203] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), Chapter 30, pp. 1552-1553.
[204] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'* (20th edition), Sweet & Maxwell (1996), p. 377, Article 183.
[205] S. Baughen – *'Shipping Law'*, 4th edition (2009), p. 136.
[206] *Houlden & Co, Ltd v SS Red Jacket (The "Red Jacket")*, 582 F.2d 1271 (2d Cir, 1978), [1978] 1 Lloyd's Law Reports 300.
[207] Therefore, the exception in Article IV rule 2(c) (peril of the sea) was not applicable as a defence.
[208] *The "Red Jacket"*, [1978] 1 Lloyd's Law Reports 300, at p. 301.
[209] *The "Red Jacket"*, [1978] 1 Lloyd's Law Reports 300, at p. 307.
[210] *The "Red Jacket"*, [1978] 1 Lloyd's Law Reports 300, at pp. 307-308.

proximate cause of the cargo loss and the accompanying cargo damage.[211] As a result, the carrier was found to have breached its obligation under US COGSA § 1303(1) to exercise due diligence to make the ship seaworthy.

The renowned Swiss author Prof. von Ziegler criticizes this decision as one, which has reached a justified result but which is based on poor legal grounds.[212] Interestingly, Von Ziegler asserts that, although the carrier is responsible for empty FCL containers, the provision of such a container by the carrier to the shipper is a separate contract *sui generis* which is not subject to the *lex specialis* of the Hague Rules, and the unseaworthiness of the carrier-supplied container is actually a breach of this separate contract.[213] In the opinion of the author of the present thesis, however, such a proposition is misleading if it is promulgated as a general rule and, certainly, does not apply to the facts of *The "Red Jacket"* case. Von Ziegler's reasoning could apply to the particular situation where such a separate and additional container lease agreement indeed exists between a carrier and a shipper but this is rather an additional legal relationship which does not affect the carrier's obligations under the bill of lading.[214] Whereas, under a contract of carriage, without any additional lease agreements (what was the case in *The Red Jacket*), it is generally accepted that, regardless of which party supplies the container, there is no distinct or autonomous contract for the supply of the container in parallel to the contract of carriage.[215] Therefore, no additional contractual rights or obligations can be derived for the carrier in addition to the existing ones under the bills of lading and the applicable maritime transport rules.

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[211] *The "Red Jacket"*, [1978] 1 Lloyd's Law Reports 300, at p. 308.

[212] Alexander von Ziegler – *'Haftungsgrundlage im internationalen Seefrachtrecht'* [*'Liability Basis in International Maritime Law'*], Schulthess (2002), at pp. 102-103: *„In diesem Licht ist ein vielzitierter US-amerikanischer Entscheid des südlichen Distrikts von New York aus dem Jahr 1977, was die rechtliche Begründung betrifft, als Fehlentscheid anzusehen: Obwohl es sich um einen vom Ablader verstauten und abgelieferten <<house to house>>-Container handelte, wurde der Seefrachtführer für die strukturellen Mängel des Containers* verantwortlich gemacht. Zwei Sachverhaltselemente erklären und rechtfertigen zwar das Resultat, nicht aber die rechtliche Herleitung: Einmal war der Container ursprünglich vom Reeder bzw. vom Seefrachtführer zur Stauung durch die Ablader übergeben worden."* [In this light, the highly cited decision from the US District Court (Southern District of New York) from 1977 [The *"Red Jacket"*] which must be regarded as a wrong decision: although the container was stuffed by the shipper and delivered on a house-to-house basis, the ocean carrier was blamed for the structural deficiencies of the container. There are two aspects of the case – although the court decision indeed explained the facts and reached a justified result, it has a poor legal reasoning: the container was, at a certain point, handed over by the shipowner, respectively the sea carrier, to the shipper for stowage.]

[213] Alexander von Ziegler – *'Haftungsgrundlage im internationalen Seefrachtrecht'* [*'Liability Basis in International Maritime Law'*], Schulthess (2002), at p. 100: *„Die Überlassung eines solchen FCL-Containers durch den Seefrachtführer ist nicht Bestandteil des durch das Seefrachtrecht erfassten Beförderungsvertrages. Vielmehr wird hier ein separater Überlassungsvertrag sui generis abgeschlossen, der nicht der lex specialis der Hager Regeln bzw. den entsprechenden nationalen Seefrachtgesetzen unterliegt."*, and at p. 103: *„Richtigerweise hätte eine entsprechende Seeuntüchtigkeit des Containers als Verletzung des separaten Container-Überlassungsvertrages abgewickelt werden müssen."* ["The provision of such an FCL container by the sea carrier is not part of the contract of carriage, which is covered by law on the carriage of goods. Rather, a separate lease agreement is concluded *sui generis*, which is not the *lex specialis* of the Hague Rules or the corresponding national laws on the carriage of goods. […] If it had been done correctly [in *The "Red Jacket"* case], a corresponding unseaworthiness of the container should have been treated as a violation of the separate contract to provide a container."]

[214] For example, an additional leasing agreement between the carrier and the shipper could arise where the carrier leases, on the express wish of the shipper, a container which will be transported via several modes during the carriage and the carrier will usually ask for additional remuneration for the lease of the container. In this case, the carrier will be liable under the applicable contract of carriage for any damage or loss to the cargo, whereas any damage to the container will be governed by the lease agreement.

[215] Pierre-Jean Bordahandy – *'Containers: a conundrum or a concept?'*, (2005) 11 JIML342, at p. 364.

Furthermore, von Ziegler makes the important observation that the carrier's duty to provide a suitable LCL container stems not from his duty to exercise due diligence to provide a seaworthy vessel under Article III rule 1, but from the carrier's duty of care over the cargo under Article III rule 2.[216] The rationale is that such a container is not part of the ship within the meaning of Art. III r. 1, which points once again to how important the classification of a container is – whether it is considered part of the vessel or part of the cargo. What is more, if a container provided by the carrier to the shipper is in an impeccable state but is not suitable in all aspects to carry the cargo (*e.g.* if a standard container is used when a reefer or a ventilated container is needed), the carrier may not be held liable for breaching his duty under Article III rule 1 but instead he could be held accountable under Article III rule 2 and, therefore, he will be able to excuse himself and benefit from the liability exemptions in Article IV rule 2 (m) and (n) HR referring to inherent vice of the goods and insufficiency of packing, respectively.[217] The reason is that it is usually the shipper who is expected to give appropriate instructions and to determine the type of container.[218]

The opposite view was taken by the Supreme Court of the Netherlands in the *NDS Provider*, where the duty to exercise due diligence to make the ship seaworthy was extended also to FCL containers that were provided by the carrier to the shipper.[219] In that case, an analogy was made between a carrier-supplied container and a hold of the ship, to which Article III rule 1 applies. The judgment was substantiated with Article 14 (*Specific obligations applicable to the voyage by sea*) of the Rotterdam Rules.[220] However, such an approach was criticized by Dutch authors for being too far-reaching.[221] The main remark is that any reasoning to that regard should take into consideration the fact that empty FCL containers, when provided to the shipper, will be out of sight and control of the sea carrier, which presupposes that the carrier would have to inspect and check each

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[216] Alexander von Ziegler – *'Haftungsgrundlage im internationalen Seefrachtrecht'* [*'Liability Basis in International Maritime Law'*], Schulthess (2002), at p. 101: „Hat der Seefrachtführer den Ladebehälter (Container) dem Ablader zur Verfügung gestellt, indem er darin die vorgängig vom Ablader übernommenen Waren verstaut oder verstauen lässt (*LCL-Container*), so ist diese Überlassung als Bestandteil des Seefrachtvertrages anzusehen. Dadurch erstreckt sich seine seefrachtrechtliche Sorgfaltspflicht auch auf die Tauglichkeit dieses Containers für die beabsichtigte Reise. Es ist aber auch bei Beförderungen mittels LCL-Containern falsch, von einer Sorgfaltspflicht für anfängliche See- und Reisetüchtigkeit nach Art.3 I lit. a-c HR zu sprechen. Trotz seiner logistischen Funktion ist der LCL-Container nicht als <<anderer Teil des Schiffes>> nach Art. 3 I lit. c HR zu bezeichnen. Die Pflicht, für den Zustand und die Tauglichkeit des LCL-Containers zu sorgen, ist vielmehr Ausfluss der allgemeinen und andauernden Umgebungssorgfalt." [When the sea carrier makes the loading container available to the shipper by stuffing in the container (LCL-Container) the goods which were in advance acquired from the shipper, then this provision of the container is regarded as a part of the contract of carriage. Therefore, the maritime law duty of care extends also to the suitability of this container for the intended voyage. But it is also wrong, when the carriage is of LCL-Containers, to say that the duty of care for initial sea- and voyage-worthiness is in accordance with Art.III rule 1(a-c) of the Hague Rules. Despite its logistic function, the LCL container should not be regarded as "other part of the vessel" in accordance with Art. III rule 1(c) HR. The duty to care for the condition and the suitability of the LCL containers is rather flowing from a general pre-duty of care in accordance with Article III rule 2 in the sense of a general and continual care of the place around the container.]

[217] Alexander von Ziegler – *'Haftungsgrundlage im internationalen Seefrachtrecht'* [*'Liability Basis in International Maritime Law'*], Schulthess (2002), at p. 102.

[218] Alexander von Ziegler – *'Haftungsgrundlage im internationalen Seefrachtrecht'* [*'Liability Basis in International Maritime Law'*], Schulthess (2002), at p. 102 (*ibid.*).

[219] *NDS Provider*, Hoge Raad (C06/082 HR), 1 February 2008, Schip & Schade 2008, Nr. 46.

[220] On the approach of the Rotterdam Rules towards containers, see: *section 8* below.

[221] N.J. Margetson – *'The System of Liability of articles III and IV of the Hague (Visby) Rules'*, Zutphen: Uitgeverij Paris (2008), p. 48.

and every FCL container that comes back from the shipper's premises in order for the carrier to avoid any liability risks stemming from the high standard set by the Supreme Court by extending the duty in Article III rule 1 to containers.[222] This is obviously not feasible, given the amount and speed of the container trade. Therefore, it has been submitted that an alternative solution could be that the contract of carriage determines the liability for damage or loss of goods caused by faulty containers.[223] In the *NDS Provider*, however, the Supreme Court struck down a liability exemption clause for unsuitable containers as a clause that is contrary to Article III rule 8 of the Rules.

Another relevant point worthy of being discussed is the introduction of weight limitation by the Hague-Visby Rules as an alternative limitation, which has certain implications also for containerized shipments. Certainly, the kilo limitation favours and is related to bulk cargo because obviously no packages can be described in the bill of lading for such type of cargo. A unit of bulk cargo is associated with weight or volume and as such it is not covered by the package limitation. The reason for excluding bulk cargo from the package limitation is said to be associated with the traditional dislike of liability-exemption clauses that favoured the carrier and that the Rules actually sought to prevent.[224] Furthermore, the word "unit" is understood as a shipping unit and most European courts have not endorsed the interpretation of the word "unit" as comprising the notion of "freight unit".[225]

In the case of containerized carriage, however, either limitation – package or weight limitation – could be applicable, *"whichever is the higher"*.[226] Literature points to a convenient means of determining which of the two limitation rules will apply to the specific cargo depending on the weight of the goods.[227] Provided that cargo loss or damage is high enough to trigger weight limitation (*i.e.* it is more than 2 SDR per kg), the line above which the weight limitation would apply is weight of 334 kg of the package or unit, which equals 668 SDR, being a higher amount than the unit limitation of 666.67 SDR per package. Accordingly, all goods that weigh less than 334 kg will trigger the unit limitation, being the higher one in that case.[228] This is a valuable starting point in assessing the amount of liability for unitized shipments. Let us take for example the following scenario – a container is stuffed with three boxes (each having a

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[222] N.J. Margetson – *'The System of Liability of articles III and IV of the Hague (Visby) Rules'*, Zutphen: Uitgeverij Paris (2008), p. 48 (*ibid.*).

[223] N.J. Margetson – *'Liability of the carrier under the Hague (Visby) Rules for cargo damage caused by unseaworthiness of its containers'*, (2008) JIML 14, pp. 153-161, at p. 153.

[224] Erling Selvig – *"Unit Limitation of Carrier's Liability: The Hague Rules Art. IV(5)"*, Oslo, Norway (1961), p. 39, §3.32.

[225] However, this is not the case with American Law and US COGSA, which includes the wording "customary freight unit" in its corresponding provision – §1304(5). Under US law, the freight unit can also be regarded as a shipping unit. See the study in comparative private maritime law by Erling Selvig – *"Unit Limitation of Carrier's Liability: The Hague Rules Art. IV(5)"*, Oslo, Norway (1961), Chapter II: Interpretation of the Principal Rule of HR Art. IV(5), §3.The terms "package" and "unit" pp. 35-80, at p. 51. In that respect, it should be mentioned that although the term "freight" is often used in practice incorrectly as a synonym of cargo, it specifically designates the remuneration paid in connection with the carriage of goods. Therefore, by "freight unit" one should not understand shipping unit but a unit, on which the freight is adjusted, measured in mass or volume.

[226] See Article IV rule 5(a) of the Hague-Visby Rules.

[227] Erik Røsæg – *"Implementation of the Rotterdam Rules in Norway"*, Scandinavian Institute of Maritime Law Yearbook (SIMPLY) 2014, pp. 49-108, at p. 65.

[228] Prof. E. Røsæg also computed the corresponding dividing line under the Rotterdam Rules, beyond which the 3 SDR weight limitation will be applicable – 292 kg. (*ibid.*)

value of 2000 SDR), which are stated on the bill of lading as separate packages under the container clause. It happens that the first box of cargo is completely damaged (2000 SDR) while the other two boxes are each only one-fourth damaged (500 SDR), which makes the total damage 3000 SDR. Let us assume that each box weighs less than 334 kg, then the unit limitation will apply as being the higher one. In this case, the carrier will be able to limit his liability to 2000 SDR, being the number of packages multiplied by 666.67 SDR per package. An important point here is that the carrier cannot apply the per package limitation with regard to the damage to each package separately but he can limit on the basis of the number of packages regardless of the amount of damage each box has sustained. To illustrate this point, the carrier in this example cannot limit his liability in the following fashion: 666.67 SDR with regard to the first box which is completely damaged; 500 SDR, which is the amount of the damage for the second box; and, similarly, another 500 SDR which is the amount of the damage of the third box, which eventually would result in a total limitation of 1666.67 SDR. However, this is not the mechanism prescribed by the Rules. As stated, the carrier in this example can limit his liability for the damaged cargo in the container to the amount of 2000 SDR, being the package limitation amount multiplied by the number of packages carried in the container.

To illustrate the importance of the weight limitation, let us assume that the same consignment under the same facts is carried under the bills of lading, but this time as a single package – the container. Therefore, the package limitation will not be applicable since there will be only one package (tantamount to unit limitation of 666.67 SDR), while the entire consignment will certainly weigh more than the required 334 kg given the fact that only the tare weight of the container exceeds by far this figure.

Furthermore, the discussion about the proper and careful loading, stowage, securing, and care for containers must consider that they are actually very fragile units. As observed in *section 3*, the technical parameters of containers reveal that, with the exception of their corner posts and framework, they are of a more fragile construction than they appear. Containers, as well as containerships and all seagoing vessels, are subject to six motions – three linear motions and three rotational motions. These are: surging (a linear motion along the longitudinal axis of the vessel, which is a forward motion), swaying (a linear motion along the transverse axis, which is a sideways motion), heaving (a linear motion along the vertical axis; a vertical motion), rolling (a rotational motion around the longitudinal axis), pitching (a rotational motion around the transverse axis), and yawing (a rotational motion around the vertical axis, which represents a momentary deflection from the projected course).[229] In a stormy weather, the rolling, pitching and heaving of the ship produce the greatest forces that affect her and the containers on board, in particular.[230] This is the reason why containers are stowed longitudinally and not athwart ship. In the latter case, the rolling motion of the ship would cause cargo to be thrown against the doors, which might have as a result the collapse of the entire stow of containers.[231] What is more, the forces produced by all these

[229] German Insurance Association (GDV) – *'Container Handbook'* (2012), section 2.3.3 Mechanical stresses in maritime transport.
[230] Charles Bliault and North of England P&I Association – *'Cargo Stowage and Securing'* (2nd edition), 2007, pp. 82-83.
[231] Capt. R.E. Thomas – *'Thomas' Stowage'*, 2nd edition (1985), p. 54.

vertical and horizontal motions augment and are of greater magnitude when exerted on containers and their lashing if the steel boxes are stowed either, for example, higher up in the stack, or at the bow and on the stern of the vessel. Besides, while adequate protection is taken care about the forces that make cargo move longitudinally (fore-and-aft), it has been reported that the vertical movement of the vessel has been wholly neglected.[232] Heaving, pitching and rolling, particularly, provide vertical acceleration and deceleration forces that act on the cargo and may reach value of 2g, meaning that the lashing and securing arrangements will have to sustain two times the static weight of the cargo.[233] The provisions of Article III rule 2 requires taking all this information into account when stowing and securing the containers on board regardless whether these are shipper-supplied or carrier-supplied containers. Here, the issue which party provided the container plays an irrelevant role. In any event, carriers must properly and carefully stow containers while taking into account any relevant information, most notably the stowing weight that a container can bear so that no weight limit is exceeded and no heavy containers are stowed in the upper tiers.

Strictly speaking, the standard of "properly and carefully" should comply with the specific nature of the carriage of containers and, therefore, must consider the aforementioned characteristics of containerized shipments. This requirement is actually not relevant only to containers but, as already observed in *Chapter II*, applies in general to any cargo – the carrier must care for the cargo *"in accordance with a sound system"*[234] and *"in the appropriate manner looking to the actual nature of the consignment"*.[235] Containers, however, are a unique means of transport and as such they give rise to additional and previously unknown stowage issues. For example, cargo's weight should be evenly distributed in the container, while the centre of gravity should be as low as possible and near to the centre of the container.[236] Also, either half of the container should not carry more than 60% of the cargo.[237] Besides, loading containers on board a vessel requires specific knowledge regarding container stowage, lashing and securing. Absent such knowledge, the carrier may be held liable for breaching his obligation under Article III rule 2 to properly and carefully handle, stow, carry, keep, and care for the containerized cargo.

The carrier's cargo-related obligations under Article III rule 2 of the Rules may be said to have a higher standard, compared to the carriage of general cargo, when the cargo is carried in containers. For example, a carrier may have far greater responsibilities when the carriage involves refrigerated carrying systems. In this case, it is required that a qualified reefer engineer or an electrician is present on board so that the refrigerating equipment and the reefers can be monitored, maintained and, if

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[232] UK P&I – *"Container matters: The container revolution of the 1960s was deemed to be the solution to limiting cargo damage, but has experience proved otherwise?"*, a supplement to LP News 13, published in September 2000, p. 4.
[233] UK P&I – *"Container matters: The container revolution of the 1960s was deemed to be the solution to limiting cargo damage, but has experience proved otherwise?"*, a supplement to LP News 13, published in September 2000, p. 4. (*ibid.*)
[234] *G. H. Renton & Co., Ltd. V. Palmyra Trading Corporation of Panama* (The "Caspiana") [1957] A.C. 149.
[235] *Albacora S.R.L. v. Westcott & Laurance Line, Ltd. (The "Maltasian")*, Lloyd's Law Reports [1966], Vol. 2, p. 53 at p.58.
[236] Capt. R.E. Thomas – *'Thomas' Stowage'*, 2nd edition (1985), p. 58.
[237] Capt. R.E. Thomas – *'Thomas' Stowage'*, 2nd edition (1985), p. 58 (ibid.)

needed, repaired.[238] A refrigerated container may have very complex equipment such as a controlled atmosphere system, which can maintain atmospheric conditions that are different than normal through lowering oxygen levels and increasing carbon dioxide, which increases the practical storage life (PSL) of the perishable goods.[239] Such a controlled atmosphere system is also accompanied by adequate safety systems because the atmospheric conditions created inside the container may be fatal to human beings.

A particular difficulty is that when reefers have their own power supply, there could be only one amongst tens of other reefer containers that is malfunctioning, while the rest are showing no indication of any failure. Situations like this require constant supervision and checking. For some products, maintaining the precise temperature within the reefer is vital, failing which the goods inside may be considered a total loss. It must not be forgotten that some perishable goods like fruits, meat, fish, vegetables or flowers have a short life, and it has been ascertained that they can spend more than half of their so-called practical storage life (PSL) in transit inside a refrigerated container.[240] Reefers are generally designed to carry frozen and chilled products,[241] and while frozen products do not suffer that much from over-cooling, chilled products require a specific temperature that is encountered in their natural growing are and, if the refrigerated container temperature is lower than that, these products may be exposed to chilling injury.[242] Furthermore, some goods that are to be carried in a refrigerated container must be pre-cooled to the correct temperature for carriage before being stowed in the container. Stowing warm cargo in a cooled reefer may have adverse effects to other adjacent cargo in the container; that is why cargo of mixed temperature should not be stowed in the container.[243] Finally, stowage of the chilled or frozen goods inside the container is also equally important – the stowed cargo must not block any air inflows as the air circulation in the container is vital for the proper operation of the cooling systems. In each refrigerated container, there is a red mark signifying that cargo should not be stowed above that line so that air can freely flow there. However, stowage is often not under the control of the carrier, and not within his responsibilities, because he only receives a sealed shipper-supplied container that was packed by the shipper and is "said to contain" certain cargo.

Some of the most common technical failures of containers that occur in practice are associated with holes or tears in the side panels; broken or compromised door hinges, locks or seals; cracked corner castings/fittings; problematic retracting of the roof bows of open-top containers; wrong temperature setting, poor temperature monitoring and/or

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[238] R. C. Springall – *'The transport of goods in refrigerated containers: an Australian perspective'*, Lloyd's Maritime and Commercial Law Quarterly, May 1987, Part 2, p. 216, at p. 222.
[239] UK P&I – *"Reefer matters: A focus on some of the issues surrounding the carriage of refrigerated cargoes"*, at p. 9.
[240] UK P&I – *"Container matters: The container revolution of the 1960s was deemed to be the solution to limiting cargo damage, but has experience proved otherwise?"*, a supplement to LP News 13, published in September 2000, p. 8.
[241] Frozen goods are regarded as "inert" cargo and are carried at temperatures of -18°C and below, while chilled goods are regarded as "live" cargo and they are usually carried at temperatures not lower than -1.1°C. Both categories, frozen cargo and chilled cargo, are considered perishable goods.
[242] UK P&I – *"Reefer matters: A focus on some of the issues surrounding the carriage of refrigerated cargoes"*, at p. 3.
[243] International Chamber of Shipping (ICS) and World Shipping Council (WSC) – *"Safe Transport of Containers by Sea: Industry Guidance for Shippers and Container Stuffers"*.

wrong use of temperature controls of reefer containers; inadequate ventilation; container overloading and/or exceeding stack weights; poor distribution of cargo weight within the container; poor stowage of containers (*e.g.* heavy containers stowed on light containers).[244]

In conclusion, when carriage of goods into containers is involved, the application of Article III rule 2 is largely dependent on whether the container has been supplied by the shipper or by the carrier, and also on whose responsibility it was to pack and/or unpack the container.[245] For example, if the container was stuffed by the shipper and the goods inside were found to have been damaged as a result of poor stowage, then the carrier is unlikely to be held in breach of his respective obligations under Article III rule 2. Besides, he will normally be able to invoke the defences in Article IV rule 2 (i), (n), and (q) which relate to damage arising out of act or omission of the shipper, insufficiency of packing or any other cause arising without the actual fault of the carrier. In that context, the Rules, and in particular the obligation to *"properly and carefully […] carry, keep and care for the goods carried"*, do not seem to impose a duty on the carrier to open and inspect the contents of a container that was stuffed by the shipper. In *Reechel v Italia di Navigazioni*, an open-top FEU was stuffed by the shipper and carried on an FCL term.[246] After the container was discharged at the port of destination, it smashed the small truck, to which it was attached on the way to the container depot in the vicinity of the port. The accident happened upon a manoeuvre of the truck and it was due to a poor stowage inside the container, causing the death of the truck driver. The District Court held, among others, that the carrier was under no duty to open and examine a container supplied by the shipper. This American decision does not seem to contravene the English approach as there is no English ruling, either, to interpret Article III rule 2 so as to impose such an obligation on the carrier. On the other hand, a carrier may be held liable for breaching his obligations under Article III rule 2 if he accepts cargo stuffed in a container provided by the shipper in a poor condition, without the carrier noting any reservation on the shipping document.[247]

6.2 Article III rule 2 applied to the cargo inside containers

The act of stuffing the container by the carrier is often equated with the process of loading of a vessel.[248] This proposition supports the view that carrier-supplied containers are part of the ship rather than part of the cargo. When cargo is stuffed into a container by the carrier, this operation must also be done *"properly and carefully"*, which means that it must be carried out with the utilization of appropriate bracing, blocking and dunnaging in the container.[249]

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[244] See: International Chamber of Shipping (ICS) and World Shipping Council (WSC) – *"Safe Transport of Containers by Sea: Industry Guidance for Shippers and Container Stuffers"* and UK P&I – *"Container matters: The container revolution of the 1960s was deemed to be the solution to limiting cargo damage, but has experience proved otherwise?"*, a supplement to LP News 13, published in September 2000, p. 2.
[245] See section 5.1.
[246] *Reechel v. Italia di Navigazione Societa*, 690 F. Supp. 438 (D. Md. 1988).
[247] S. Baughen – *'Shipping Law'*, (6th edition), p. 123.
[248] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), Chapter 25, p. 1301.
[249] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), Chapter 25, p. 1301 and Chapter 30, pp. 1560-1561.

In particular, Article III rule 2 requires a carrier to stuff any container in accordance with all applicable standards and regulations such as the SOLAS Convention and the IMDG Code. Faulty stuffing of the container, however, could be a breach of both Article III rule 1 and Article III rule 2. In *Kapitan Sakharov*, for example, the carrier was held liable for stowing a tank container containing isopentene, a highly-flammable substance, below deck and without mechanical ventilation, which was contrary to the provisions of the abovementioned international instruments as well as to MOPOG, the Russian Regulations for Carriage of Dangerous Goods by Sea.[250] The relevant provisions of the IMDG required such hazardous cargo to be stowed either in a mechanically ventilated space or on deck. Stowing the cargo in tank containers under deck was thus a breach by the carrier. In that particular case, however, the failure to meet these regulations caused the carrier to be held in breach of not only Article III rule 2 but also of his seaworthiness obligation. While it was submitted that non-compliance with such codes and regulations does not necessarily constitute want of due diligence to provide a seaworthy vessel, the judge in *Kapitan Sakharov* held that, considering the fact that the particular stowage also contravened the vessel's technical certificate coupled with the fact that the non-compliance was so plainly unreasonable, the carrier must be expected to have been aware of the dire consequences and, therefore, was held liable for not exercising due diligence to provide a seaworthy vessel.[251] This case is also an example of a carrier crossing the line between bad stowage and unseaworthiness as well as an example of the fact that establishing the moment of such crossing may become even more difficult in containerized shipments.[252]

On the other hand, the carrier will not be held liable for damage to goods that have been stuffed into the container by the shipper.[253] Obviously, a carrier is not under the same obligation, namely to properly and carefully stuff the container, when the process of stuffing the container is responsibility of the shipper and is carried out by him under the contract of carriage. Here, one cannot allude to a transfer of the obligation to load and stow the goods within the meaning of a FIOS(T) clause,[254] because stuffing the goods into a container is not the same as loading the container aboard the vessel, although a parallel between the two was made in the beginning of this sub-section. However, the burden of proof in case of shipper-packed containers is on the carrier, who has to prove that the damage caused was a result of, for example, an act or omission of the shipper or of insufficiency of packing, in order to avail himself of the protection under Article IV rule 2(i), (n) or (q).[255] This is the situation when damage or loss of the cargo was caused by a defect in the shipper-supplied container as seen in *section 6.1* above, or by the manner of stowage of the goods inside the container. In these cases, the carrier

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[250] *Northern Shipping Co. v Deutsche Seereederei GmbH and Others (The "Kapitan Sakharov")*, [2000] 2 Lloyd's Law Reports 255.
[251] *Northern Shipping Co. v Deutsche Seereederei GmbH and Others (The "Kapitan Sakharov")*, [2000] 2 Lloyd's Law Reports 255, at p. 268.
[252] Note Langley J.'s comment in *The "Imvros"* [1999] 1 Lloyd's Law Reports 848 at p. 851: *"it is often not an easy question to determine the moment when the line between bad stowage and unseaworthiness is crossed".*
[253] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), Chapter 25, p. 1301. (*ibid.*)
[254] For the FIOS(T) clause, see *Chapter III* above.
[255] S. Baughen – *'Shipping Law'*, 4th edition (2009), p. 136; Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'* (20th edition), Sweet & Maxwell (1996), p. 376, Article 183.

still has to resort to the respective Hague-Visby Rules defences in Article IV because, regardless that it was the shipper to stuff the container, the carrier is bound to fulfil his bundle of obligations under Article III rule 2 nevertheless, and it is he who bears the evidential burden that he has not breached any of those obligations.

However, the carrier will still be responsible vis-à-vis third party cargo owners for faulty stowage inside the container performed by the shipper, when the negligently stowed goods have led to damage to nearby containerized cargo. In the Dutch case *Boknis*, an open-top container laden with steel rolls was carried from Rotterdam to Southampton.[256] The vessel encountered severe winter storm and, as a result of the rolling and pitching motions of the vessel, the 20 tons of steel rolls, which were negligently stowed in the container by the shipper, started shifting and hitting the walls and the doors of the container.[257] The steel cargo eventually broke out of the container and the container itself also broke loose, which resulted in damage to other adjacent containers and their contents. Moreover, the steel rolls pierced the hull of the vessel, which caused sea water to enter the hold and this inflicted further damage to the cargo stowed in that hold.[258] The insufficient stowage of the steel rolls was established as there were no traces left of any stowage materials. The Court in Rotterdam held that the carrier could not exculpate himself vis-à-vis other cargo interests with the defence under Article IV rule 2 (q) by stating that the shipper's negligent stowage was the result of damage. Considering the damage caused also by the shifting container, the carrier was held liable for insufficient care for stowage and seaworthiness.[259]

Containers packed by the shipper are usually sealed, which is a useful way to allocate responsibilities and losses. The number of the seal is indicated also on the transport document, and if the seal is intact, it creates a presumption that the loss or damage inside the container did not occur due to the carrier's fault but happened before shipment or after delivery of the cargo. Conversely, if the seal is found to be broken upon delivery, then the carrier will be held responsible for the damaged or missing goods unless the carrier could prove that the loss or damage occurred outside the time when the carrier had custody of the goods.[260]

A shipper-packed container will usually be evidenced in the bill of lading as *"one container in apparent good order and condition said to contain […] as declared by the shipper"*. Such a notation does not bind the carrier to the description and condition of the contents of the container, which means that, in the presence of such a notation, the words *"shipped in good order and condition"* or *"shipped in apparent good order and condition"* will not constitute an estoppel towards an endorsee of the bill of lading, which would otherwise prevent the carrier from proving that the containerized cargo was not in good order and condition.[261] Absent such a notation, the carrier will face a very onerous

[256] *Boknis*, Rotterdam District Court, 1 July 1983, Schip & Schade 1983, Nr 117.
[257] *Boknis*, Rotterdam District Court, 1 July 1983, Schip & Schade 1983, Nr 117, at p. 290.
[258] *Boknis*, Rotterdam District Court, 1 July 1983, Schip & Schade 1983, Nr 117, at p.288.
[259] M.L. Hendrikse, N.H. Margetson, N.J. Margetson – *'Aspects of Maritime Law: Claims under Bills of Lading'* (2008), pp. 199-200; Ignacio Arroyo (editor) – *'The Yearbook of Maritime Law'*, Springer Science+Business Media Dordrecht (1986), p. 257.
[260] William Tetley – *'Marine Cargo Claims'* (4th edition), Les Editions Yvon Blais Inc. (2008), Chapter 30, p. 1561.
[261] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'* (20th edition), Sweet & Maxwell (1996), p. 377, Article 183.

burden of proof, and he could escape being bound to the B/L representation regarding the description and condition of the containerized goods only by either proving that the respective statement was untrue, or proving that the third party bill of lading holder did not act upon having faith in the B/L statement.[262]

Nowadays most bills of lading contain clauses that expressly provide that when the bill relates to shipper-packed containers, then that bill functions as a receipt only for the container and not for the cargo stowed inside.[263] The following table will summarize the relevant B/L clauses of various carriers.

Maersk Line, Multimodal transport bill of lading **Clause 11. Shipper-Packed Containers**	MSC, Bill of Lading Standard Terms and Conditions **Clause 11. MERCHANT-PACKED CONTAINERS**
If a Container has not been packed by the Carrier: 11.1 This bill of lading shall be a receipt only for such a Container; 11.2 The Carrier shall not be liable for loss of or damage to the contents and the Merchant shall indemnify the Carrier against any injury, loss, damage, liability or expense whatsoever incurred by the Carrier if such loss of or damage to the contents and/or such injury, loss, damage, liability or expense has been caused by any matter beyond his control including, inter alia, without prejudice to the generality of this exclusion: (a) the manner in which the Container has been packed; or (b) the unsuitability of the Goods for carriage in Containers; or (c) the unsuitability or defective condition of the Container; or (d) the incorrect setting of any thermostatic, ventilation, or other special controls thereof, provided that, if the Container has been supplied by the Carrier, this unsuitability or defective condition could have been apparent upon reasonable inspection by the Merchant at or prior to the time the Container was packed. 11.3 The Merchant is responsible for the packing and sealing of all shipper packed Containers and, if a shipper packed Container is delivered by the Carrier with any original seal intact, the Carrier shall not be liable for any shortage of Goods ascertained at delivery. 11.4 The Shipper shall inspect Containers before packing them and the use of Containers shall be	If a Container has not been packed by or on behalf of the Carrier: 11.1 The Merchant shall inspect the Container for suitability for carriage of the Goods before packing it. The Merchant's use of the Container shall be prima facie evidence of its being sound and suitable for use. 11.2 The Carrier shall not be liable for loss of or damage to the Goods caused by: (a) the manner in which the Goods have been packed, stowed, stuffed or secured in the Container, or (b) the unsuitability of the Goods for carriage in the Container supplied or for carriage by Container between the Ports or Places specified herein, or (c) the unsuitability or defective condition of the Container or the incorrect setting of any refrigeration controls thereof, provided that, if the Container has been supplied by or on behalf of the Carrier, this unsuitability or defective condition would have been apparent upon inspection by the Merchant at or prior to the time when the Container was packed, or (d) packing refrigerated Goods that are not properly pre-cooled to the correct temperature for carriage or before the refrigerated Container has been properly pre-cooled to the correct carrying temperature. 11.3 The Merchant is responsible for the packing and sealing of all Merchant-packed Containers and, if a Merchant-packed Container is delivered by the Carrier with an original seal as affixed by the Merchant or customs or security control intact, or the Carrier can establish bona fide circumstances in

[262] Sir Thomas Edward Scrutton, Stewart C. Boyd, Andrew S. Burrows, David Foxton – *'Scrutton on Charterparties and Bills of Lading'* (20th edition), Sweet & Maxwell (1996), pp. 119-190, Article 63.
[263] For the three main functions of bills of lading, see *Chapter I*, section 2.1.2 above.

prima facie evidence of their being sound and suitable for use.	which the original seal was replaced, the Carrier shall not be liable for any shortage of Goods ascertained upon delivery. 11.4 The Merchant shall indemnify the Carrier against any loss, damage, liability or expense whatsoever and howsoever arising caused by one or more of the matters referred to in clause 11. 2, including but not limited to damage to Container, other cargo and the Vessel.
CMA CGM, Bill of Lading Terms and Conditions **Clause 23. SHIPPER-PACKED CONTAINERS** If a Container has not been packed by or on behalf of the Carrier: (1) The Carrier shall not be liable for loss of or damage to the Goods caused by: (a) the manner in which the Goods has been packed, stowed, stuffed or secured, or (b) the unsuitability of the Goods for Carriage in the Container supplied, or (c) the unsuitability or defective condition of the Container or the incorrect setting of any refrigeration controls thereof, provided that, if the Container has been supplied by or on behalf of the Carrier, this unsuitability or defective condition would have been apparent upon inspection by the Merchant at or prior to the time when the Container was packed, or (d) packing refrigerated Goods that are not at the correct temperature for Carriage. (2) The Shipper is responsible for the packing and sealing of all Shipper-packed Containers and, if a Shipper-packed Container is delivered by the Carrier with its original seal as affixed by the Shipper intact, the Carrier shall not be liable for any shortage of Goods ascertained at delivery. (3) The Merchant shall indemnify the Carrier against any loss, damage, liability or expense whatsoever and howsoever arising caused by one or more of the matters referred to in Clause 23 (1), save that, if the loss, damage liability or expense was caused by a matter referred to in Clause 23 (1) (c), the Merchant shall not be liable to indemnify the Carrier in respect thereof unless the proviso referred to in that Clause applies.	Evergreen Line, Bill of Lading (Revised May 2012) **Clause 10. Shipper-Packed Containers** If a Container has not been filled, packed, stuffed or loaded by the Carrier, the Carrier shall not be liable for loss or damage to the contents and the Merchant shall indemnify the Carrier against any loss, damage, liability or expense incurred by the Carrier, if such loss, damage, liability or expense has been caused by: (a) the manner in which the Container has been filled, packed, stuffed or loaded; or (b) the unsuitability of the contents for carriage in Containers; or (c) the unsuitability or defective condition of the Container arising without any want of due diligence on the part of the Carrier to make the Container reasonably fit for the purpose for which it is required; or (d) the unsuitability or defective condition of the Container which would have been apparent upon reasonable inspection by the Merchant at or prior to the time when the Container was filled, packed, stuffed or loaded, or (e) the discovery of any drugs, narcotics or other illegal substances within Containers packed by the Merchant or inside Goods supplied by the Merchant, and shall indemnify the Carrier in respect thereof. Any reference in this Bill to Shipped on Board or Clean on Board relates solely to the Containers and not to the contents thereof. […]
UPS Ocean Freight Services, Multimodal Transport or Port To Port Shipment Conditions **Clause 11. CONTAINERS NOT PACKED BY CARRIER**	COSCO, Container Lines Bill of Lading (amended 24/8/2001) **Clause 10. MERCHANT-STUFFED CONTAINER**

If a Container has not been packed or filled, or the Goods, whether or not in a container, have not been prepared or packaged for transportation by or on behalf of Carrier, the provisions of this Clause shall apply. Carrier shall not be liable for loss of or damage to the contents and Merchant shall indemnify Carrier against any loss, damage, liability or expense incurred by Carrier if such loss, damage, liability or expense has been caused by: (a) the manner in which the Container has been packed or filled; or (b) the unsuitability of the Goods for Carriage in Containers or for importation or delivery at destination; or (c) the unsuitability or defective condition of any Container supplied by or on behalf of Carrier, (i) arising without any want of due diligence on the part of Carrier to make the Container reasonably fit for the purpose for which it is required, or (ii) which would have been apparent on a reasonable inspection by Merchant at or prior to the time when the Container was packed or filled; or (d) the unsuitability or defective condition of any Container not supplied by or on behalf of Carrier; or (e) the lack of proper description or preparation or packing of the Goods for transportation.	(1) If a Container has not been stuffed by or on behalf of the Carrier, the Carrier shall not be liable for loss of or damage to the Goods and the Merchant shall indemnify the Carrier against any loss, damage, liability or expense incurred by the Carrier if such loss, damage, liability or expense has been caused by: (a) the manner in which the Container has been filled, packed, loaded or stuffed, or (b) the unsuitability of the Goods for carriage in the Container, or (c) the unsuitability or defective condition of the Container, provided that, if the Container had been supplied by or on behalf of the Carrier, this unsuitability or defective condition could have been apparent upon inspection by the Merchant at or prior to the time when the Container was filled, packed, loaded or stuffed. (2) If a Merchant-stuffed Container is delivered by the Carrier with its seal intact, such delivery shall constitute full and complete performance of the Carrier's obligations hereunder and the Carrier shall not be liable for any loss or shortage of the Goods ascertained at delivery. (3) The Merchant shall inspect Containers before stuffing them and the use of a Container shall be prima facie evidence of its being suitable and without defect.

These particular clauses are generally common in bills of lading. Despite the slight difference in their wording, there is evidently a resemblance as to the content of the terms, which confirms the findings reached in sections 6.1 and 6.2 thus far. Namely, with regard to shipper-packed containers, the carrier is not liable for faulty packing of the container; for the unsuitability of the goods for containerized carriage; for the unsuitability or defective condition of the containers (provided there is no want of due diligence on behalf of the carrier), and for the incorrect setting of refrigeration controls or any thermostatic ventilation intended for the carriage of refrigerated goods, including on carrier-supplied containers, provided that any incorrect settings would have been apparent upon inspection by the shipper before or at the time of packing.

7. The problem of weighing the containers: who owes that duty?

Container weight verification has been an obstruction for the industry for a long time. Generally, each container comes on-board with a manifest which shows its contents but no carrier can vouch for what is inside the container and to what extent the

manifest list is correct. As already pointed out, the carrier is under no obligation to open and inspect containers. What is more, misdeclared cargo in a container may become inaccessible once loaded on the container vessel. Likewise, a sea carrier can hardly verify the weight of a container and, what is more, under the Hague-Visby Rules he owes no such duty.

The weight factor, however, is of utmost importance for the stability of the vessel, hence for the safety of the entire voyage. Usually, in order to maintain the vessel's stability and to evenly distribute the cargo weight, the heaviest containers are placed at the bottom (either on deck or under deck), while lighter containers are stowed on top. When containers are overweight, the ensuing damages may well exceed, for example, the damages to the cargo stowed in the misdeclared container, the damages to the surrounding on-shore infrastructure due to a falling overweight container which the crane could not support because it exceeded the crane's load limit, or the damages to the hatches of the vessel. In reality, overweight containers can have devastating consequences with cargo losses for millions of euros and the total loss of the vessel as well as the possible loss of human life. Accidents with vessels such as *MSC Napoli* and *M/V Deneb* show the gravity of such misdeclaration of containers.[264] The problem is not to be underestimated also because it has been reported that 10% of the containers involved in world trade have weight that has wrongly been declared by the shipper when the container is presented for loading.[265] Whether misstatement of container weight is caused by ignorance, negligence or a deliberate intention (*e.g.* to evade duty), it is commonly believed that there is less room for an error in trades which involve homogenous cargo because such regular shipments consist of units that have pre-set weight.[266] Conversely, smaller shippers and irregular shipments of varied type of cargo pose a greater risk because they have a bigger error-margin.[267]

Another problem which is caused by overweight containers and the ensuing stability issues is that shipping lines often may refuse to ship a particular cargo providing reasons such as *"due to stability constraints we had to short ship your cargo"*.[268]

More serious discrepancies in container weight between what has been verified and what has actually been loaded may even lead to the entire stowage plan becoming obsolete in the sense that the vessel's stability is seriously compromised, which also means that the carrier can be held liable for breaching his obligation under Article III rule 1 to exercise due diligence to provide a seaworthy vessel. Furthermore, misdeclaration of a container's weight may well affect not only the carrier's obligation to exercise due diligence to provide a seaworthy vessel, but also his obligations under Article III rule 2. The stowage plan drawn by the master is based on the figures furnished by the shipper. If those figures are incorrect, the entire stowage plan could be

[264] See *Chapter IV*, section 4.1.1.
[265] Steve Cameron – *'Misdeclared Container Weights'*, Dunelm PR, 2012; and Cameron Maritime Resources, 2012.
[266] Steve Cameron – *'Misdeclared Container Weights'*, Dunelm PR, 2012; and Cameron Maritime Resources, 2012. (*ibid.*)
[267] Steve Cameron – *'Misdeclared Container Weights'*, Dunelm PR, 2012; and Cameron Maritime Resources, 2012. (*ibid.*)
[268] Andrei Cristian – *'Overweight Containers, a Serious Threat to Ships Safety'*, Constanta Maritime University Annals, Year XII, Vol. 16, pp. 11-15, at p.13.

erroneous, resulting in an unbalanced distribution of weight as a result of which a container or an entire stack of containers may collapse.[269] In essence, overweight containers risk making any stowage plan not reliable, and that is why the industry has been for a long time in need for means of ascertaining and verifying the information provided by shippers as to the weight of the containerized cargo.

Given the nature of container shipping, the master has no means to very whether the information provided by the shipper is accurate. Moreover, nowadays' big container vessels capable of carrying over 18,000 TEUs make it virtually impossible for a master to control the weight of every single shipping container, while preserving one of the major merits of container shipping – speed. However, if a master can ascertain that a container's weight is inaccurately stated, or if he has a suspicion thereof, he is obliged to refuse the shipment of the particular cargo, especially if such a container is threatening to exceed the permissible stack capacity.[270]

The IMO has taken the issue with overweight containers very seriously and the necessary changes to the SOLAS convention were implemented. First, in September 2013, the sub-committee on Dangerous Goods, Solid Cargoes and Containers passed draft guidelines for implementation of Mandatory Container Weighing Regulations, which was approved by the IMO's Maritime Safety Committee (MSC) in May 2014 at its 93rd session. The new paragraphs of the amended Regulation 2 of SOLAS Chapter VI (Carriage of Cargoes and Oil Fuels) impose a mandatory weight verification requirement on shippers. This means that it will not be the carrier's responsibility to weigh the containers loaded or to verify the figures submitted by the shipper.

The change, which will turn container weight verification into a condition prior to loading, will become legally binding as of July 1, 2016. An exception to the provision is provided for containers that are carried on a chassis or on a trailer when transported on a ro-ro basis in short international voyages.[271] For all other containerized shipments, the shipper named on an ocean carrier's bill of lading is obliged to verify the gross mass of every packed container by using either of the following two methods. The first one is by using calibrated and certified equipment to weigh the container itself (*e.g.* a weighbridge), while the second method is by using a certified method approved by a competent authority to weigh all cargo items, packages and dunnage material inside the container as the sum of their weight is added to the tare weight of the container, and the total sum provides the verified gross mass (VGM) of the container.[272] The shipper will also have to ensure that the verified gross weight[273] of the container is stated in the

[269] Konstantinos Kofopoulos – *'Inaccurately declared container weights; The danger to Life, the International Trade and Carriage of Goods by Sea'*, European Transport Law (2014), p. 279, at p. 281.
[270] Konstantinos Kofopoulos – *'Inaccurately declared container weights; The danger to Life, the International Trade and Carriage of Goods by Sea'*, European Transport Law (2014), p. 279, at p. 285.
[271] SOLAS Chapter VI (Carriage of Cargoes and Oil Fuels), Part A (General Provisions), Regulation 2 (Cargo Information), para. 4.
[272] *Ibid*. Also, see the 'Guidelines Regarding the Verified Gross Mass of a Container Carrying Cargo' (MSC.1/Circ.1475), which define what is to be understood by "calibrated and certified equipment", and elaborate the methods for obtaining the verified gross mass of a packed container.
[273] The verified gross weight, or verified gross mass (VGM), of each and every container should be established before that container is allowed to be loaded on the vessel.

shipping document that will be submitted to the master or his representative, and that will be used in the preparation of the vessel's stowage plan.[274]

8. Carriage of containers under the Rotterdam Rules

In *Chapter II*, it was clarified that one of the aims of the new Convention was to respond to the new realities in the shipping industry. As the carriage of cargo in containers plays a major role in today's international transport, the Rotterdam Rules could not leave the steady increase in door-to-door container shipments in the liner trade unaddressed. While the Hague-Visby Rules are unimodal in nature, the Rotterdam Rules are a response to the increase in multi-modal transport, albeit not being a true multimodal instrument. The port-to-port scope has given way to door-to-door contractual arrangements, and the Rotterdam Rules include those in their scope. Furthermore, some substantial changes have been introduced with regard to the carrier's obligations over containerized cargo and these will be discussed below.

8.1 A package, or not a package, that is the question[275]

Before addressing any provision regarding the carrier's obligations associated with the carriage of containers and containerized cargo, one should note the definition provided in Article 1.26 that specifies which article of transport will be regulated by the Rotterdam Rules as a container:

> *26. "Container" means any type of container, transportable tank or flat, swapbody, or any similar unit load used to consolidate goods, and any equipment ancillary to such unit load.*

The scope of this definition is important because it has bearing, *inter alia*, on the carrier's duties regarding containers and containerized cargo, on the information provided in the contract of carriage with regard to containers as well as on the limits of liability. As seen, the definition is exhaustive and very wide, and it is likely to comprise all types of shipping container discussed in *section 3.1.3* above. On the other hand, shipper-supplied containers are always considered part of the cargo according to the definition of "goods" in Article 1.24:

> *24. "Goods" means the wares, merchandise, and articles of every kind whatsoever that a carrier undertakes to carry under a contract of carriage and includes the packing and any equipment and container not supplied by or on behalf of the carrier.*

[274] SOLAS Chapter VI (Carriage of Cargoes and Oil Fuels), Part A (General Provisions), Regulation 2 (Cargo Information), para. 5.

[275] The famous monologue of Prince Hamlet, a character in William Shakespeare's popular play *"The Tragedy of Hamlet, Prince of Denmark"*, has been widely remembered with the opening lines "to be, or not to be, that is the question", which represent the grief and lament about life's pain and unfairness, while, at the same time, the character acknowledges that the alternative of life (*i.e.* committing suicide) may well be worse. When we look at the world of sea transport, we could see a similar hesitation as to the characterizing of the shipping container either as part of the ship, or as a package and, thus, part of the cargo. Like in Shakespeare's *"Hamlet"*, the danger of choosing the worse alternative always lurks around the corner.

These two provisions show that are the drafters of the Rotterdam Rules have attempted to codify the status of containers, which is something that was missing in the Hague/Hague-Visby Rules.

However, whether carrier-supplied containers are considered part of the cargo or part of the ship, however, is closely related with the question whether such containers are considered a package within the meaning of the Rules, or not. The Rotterdam Rules follow the approach undertaken by the Hague-Visby Rules drafters, which is a documentary approach and which has already been discussed above. In the Rotterdam Rules provision on limitation of liability, there is a special clause dedicated to containers. Article 59.2 states that:

> ***Article 59 Limits of Liability***
>
> *[…]*
>
> *2. When goods are carried in or on a container, pallet or similar article of transport used to consolidate goods, or in or on a vehicle, the packages or shipping units enumerated in the contract particulars as packed in or on such article of transport or vehicle are deemed packages or shipping units. If not so enumerated, the goods in or on such article of transport or vehicle are deemed one shipping unit.*

As seen, the clause repeats the position under the Hague-Visby Rules but, at the same time, the provision has been widened to include also cargo that is carried in or on a vehicle. With this provision, addressing containers, the Rotterdam Rules correspond to the growing use of containers in the shipping industry. Article 59.2 of the Rules evidently is trying to modernize the regime applicable to this kind of sea transport, and in the opinion of the author it successfully closes the gaps between law and practice.

8.2 The carrier's obligations regarding containers

The most outstanding novelty that the Rotterdam Rules brought as far as the carriage of containers is concerned, is that the seaworthiness obligation is explicitly extended to carrier-supplied containers as well.[276] This will usually be the case with refrigerated containers because in the reefer trade it is most often the carrier who provides the containers.[277] Thus, following Article 14 of the Rotterdam Rules, the carrier is the responsible party for the cargoworthiness (seaworthiness) of the containers that he has provided, and the containers' cargoworthiness comprises the following three components: (1) the containers should be in a good condition,[278] (2) they should be able to

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[276] Article 14 (Specific obligations applicable to the voyage by sea) of the Rotterdam Rules: *"The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to: […] (c) Make and keep the holds and all other parts of the ship in which goods are carried,* ***and any containers supplied by the carrier*** *in or upon which the goods are carried, fit and safe for their reception, carriage and preservation."* [emphasis added]

[277] D. Rhidian Thomas (Editor) – *'The Carriage of Goods by Sea under the Rotterdam Rules'*, Lloyd's List (2010), Chapter 6 – *'The Duties of Carriers Under the Conventions: Care and Seaworthiness'* by Andrew Nicholas, pp. 113-117, at p. 114.

[278] Note that the carrier, if he is the owner of the container, owes this obligation also under the International Convention for Safe Containers (CSC). Article IV(4) of the CSC Convention provides that *"every container shall be maintained in a safe condition in accordance with the provisions of Annex I"*. Regulation 2 of Annex I to the CSC Convention further states, *inter alia*, that *"the owner of an approved container shall examine the container or have it examined in accordance with the procedure either prescribed or approved by the Contracting Party concerned, at intervals appropriate to operating conditions"*.

withstand the foreseeable hardships of the voyage, and (3) they should be appropriate for the cargo that is to be carried in or upon them.[279]

A particular problem associated with this provision has been brought forward in literature and it is of practical nature – should a carrier be held responsible for damage to an FCL container that he provided to the shipper for stuffing the cargo, if the damage occurred while the container was in the shipper's custody?[280] In this connection, it is important to be reminded that regardless whether the shipment is FCL door, FCL depot or FCL port,[281] any damage taking place during the process of stuffing the container by the shipper, will be outside the period of responsibility of the carrier. What is more, in such carriage arrangements, the shipper under the Rotterdam Rules is explicitly obliged to the carrier to *"properly and carefully stow, lash and secure the contents in or on the container […] and in such a way that they will not cause harm to persons or property."*[282] Worthy of mentioning is also that the shipper cannot escape from this container rule, meaning that he cannot contractually modify this obligation of his, nor can he delegate it.[283] Therefore, if the damage or defect on the container is not visible and the carrier has exercised due diligence, then he is unlikely to be held liable under Article 14 of the Rotterdam Rules. However, if, under the same circumstances, the damage to the container is visible but the carrier loads it on the vessel anyway and without putting a reservation in the transport document, then he runs the risk to be held responsible for the uncargoworthy container.

In that context, there will be a different outcome for carrier-supplied containers as opposed to shipper-supplied containers if those are found to be damaged prior to loading. In the first scenario, the carrier will be obliged to rectify the fault or replace the container if needed, or otherwise he will be held responsible for the unseaworthiness of the containers. In the second scenario, the carrier will still have the duty to check the apparent order and condition of the shipper-supplied container and, if this is the case, to insert a reservation in the transport document, which will then require the shipper either to replace the container or to assume the risk of loss or damage to the cargo, resulting from the container's unseaworthiness.[284] In that latter case, absent such a reservation, the carrier will bear the burden of proof and may need to resort to external evidence such as the so-called equipment interchange receipt, which shows the apparent condition of the container.[285]

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[279] Talal Aladwani – *'The Supply of Containers and "Seaworthiness" – The Rotterdam Rules Perspective'*, 42 JMARLC 185, at p. 187.

[280] Simon Baughen – *'Shipping Law'* (4th edition), Routledge-Cavendish (2009), p. 156, fn. 20.

[281] See section 5.3 above on the carrier's period of responsibility.

[282] Article 27 (Delivery for carriage) of the Rotterdam Rules: *"[…] 3. When a container is packed or a vehicle is loaded by the shipper, the shipper shall properly and carefully stow, lash and secure the contents in or on the container or vehicle, and in such a way that they will not cause harm to persons or property."*

[283] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), p.180, para. 6.007; Yvonne Baatz, Charles DeBattista, Filippo Lorenzon, Andrew Serdy, Hilton Staniland, Michael Tsimplis – *'The Rotterdam Rules: A Practical Annotation'*, Informa Law (2009), p. 82, para. [27-08].

[284] Talal Aladwani – *'The Supply of Containers and "Seaworthiness" – The Rotterdam Rules Perspective'*, 42 JMARLC 185, at pp. 193-194.

[285] The equipment interchange receipt is a document issued to the transferring parties every time when a container is transferred from one vessel to another or to or from a shipping terminal. The document includes information such as the container number, the type of container, the vessel/voyage code, the owner of the container, the number on the container's seal, *etc.* Most importantly, the equipment interchange receipt also

An important remark is that, despite extending the seaworthiness obligations to containers, the Rotterdam Rules do not take the approach of those courts which interpreted a container as a functional part of the ship under the Hague/Hague-Visby Rules.[286] Instead, the respective provision of the Rotterdam Rules is only targeting the specific obligation of the carrier and does not postulate a general rule as to the status of containers. As observed in *section 8.1*, a container under the Rotterdam Rules may well be considered a package for the purpose of limitation of liability; also, a container is considered goods by virtue of Article 1.24 if it is supplied by the shipper. However, an interesting comment was made in that regard at the twelfth session of UNCITRAL's Working Group III on the drafting of the Rotterdam Rules:

> *A question was raised with respect to the carrier's obligation regarding containers, as mentioned in draft article 13(1)(c) [Article 14(c)], and whether the contracts pursuant to which a carrier leased or provided containers were intended to be covered by the draft instrument. A view was expressed that* ***the draft instrument was intended only to apply to contracts of carriage, and not to separate contracts for the lease or rental of containers****. The contrary view was that the draft instrument should apply not only to the contract of carriage but also to related contracts, particularly those contracts that might be entered into for the execution of the contract of carriage. It was suggested that, without taking a stand as to whether such contracts related to the contract of carriage were covered by the draft instrument,* ***the approach in draft article 13(1)(c) was in keeping with the position adopted in most courts that when the container was provided by the carrier, it should be qualified as part of the ship's hold****, and that the same obligation that the carrier had for the ship and the care of the holds should apply to those containers once the containers were loaded on board a ship. It was also noted that this approach was in keeping with draft article 1(j) definition of "goods" [Article 1.24] to include any "container not supplied by or on behalf of the carrier or a performing party".* [emphasis added][287]

Two conclusions can be drawn out of this paragraph. First of all, this particular comment of the drafters of the Rules partly overlaps with von Ziegler's view that the provision of containers constitutes an autonomous contractual relationship between the carrier and the shipper, which is distinct from the contract of carriage. This view, to the extent that there is no separate lease agreement between the parties, was disproved in *section 6.1* of this chapter. Secondly, as to the assertion that most courts adopt the position that carrier-provided containers are part of the ship's hold, it has been thus far plainly illustrated that judicial opinion is far from unanimous on that matter.[288] Here, it could be added that although a container has a similar character and purpose to a ship's

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contains a printed drawing of the container, showing any faults and their location on the container such as dents, holes, and poorly functioning door mechanisms.

[286] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), p. 84, fn. 60.

[287] UNCITRAL Report of Working Group III (Transport Law) on the work of its twelfth session (Vienna, 6-17 October 2003), Doc A/CN.9/544, para. 152.

[288] See section 4 above.

hold, it cannot be categorized as such. The problem with characterizing a container as a functional part of a vessel's hold is that, unlike the latter, a container is a unit that is mobile and can be transported to the shipper's premises to be stuffed, or to the consignee to be unpacked. What is more, other characteristics of containers also point to another opinion – namely, that they share similar characteristics with a package that consolidates and secures the cargo. These two extreme points can explain why courts can hardly give any general, definitive, and unanimous answer as to the nature of containers.

With regard to the main Rotterdam Rules provision on the carrier's duty to care for the cargo (Article 13.1), it has not undergone such a dramatic change and the respective article lists basically almost the same duties as those set forth in Article III rule 2 of the Hague-Visby Rules, and it also prescribes an equivalent standard of care.[289] What has been changed with the new Convention is that, during a voyage, a carrier will be continuously responsible (under Article 14) for the cargoworthiness of the containers that he provided, on the one hand, and responsible at the same time for his duty of care for the containerized cargo (under Article 13). Therefore, the two obligations are now concurrently owed, namely during the voyage, since the obligation of container seaworthiness is no longer discharged once the vessel has sailed. What is peculiar about this change is that under the Rotterdam Rules, at least from the perspective of containerized carriage, the two fundamental obligations – the seaworthiness obligation and duty of care – have merged even more. Thus, under the same circumstances, a carrier may be held liable for breaching his duty under Article 14(c) to keep the containers cargoworthy if they are supplied by the carrier; or for breaching his duty under Article 13.1 to care for the cargo when those same containers are supplied by the shipper (since under Article 1.24 shipper-supplied containers are considered goods). It seems that what Langley J. established at the end of last century in *The "Imvros"* (*"it is often not an easy question to determine the moment when the line between bad stowage and unseaworthiness is crossed"*)[290] seems to be ever more relevant with regard to containerized shipments.

Likewise, adjudication under the Rotterdam Rules and the Hague-Visby Rules may be based on a different obligation of the carrier even though the circumstances are the same. In other words, a carrier's liability may be triggered for breaching a regulation enshrining a different obligation under the two Conventions even if all facts remain the same. For example, if a carrier-supplied open-top container encounters unexpected weather and the cargo starts getting damaged from seawater or rain coming inside from the roof of the container, and the carrier has a reasonable opportunity to cover the open-top container with a tarpaulin to protect the cargo from the damaging effect of the water but fails to do so, then he will obviously be held responsible. Under the Hague-Visby Rules, the carrier will be held liable for the breach of his obligation under Article III rule 2 to care for the cargo. However, under the Rotterdam Rules, the carrier will be held liable for breaching his obligation under Article 14(c) to keep cargoworthy any containers that he had supplied.

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[289] For Article 13 and the novelties as compared to the respective provision of the Hague-Visby Rules, see *Chapter II*, section 5.4.3.

[290] *The "Imvros"* [1999] 1 Lloyd's Law Reports 848 at p. 851.

Furthermore, a few additional points are worthy of addressing about this modified cargoworthiness obligation of the carrier with respect to containerized cargo. In particular, determining the carrier's liability for damaged or lost containers is specifically addressed by the Rotterdam Rules. Without reaching as far as to comment the entire mechanism of Article 17, which regulates liability and burden of proof, Article 17.5(a) is of particular interest for the liability of the carrier over containerized cargo:

> *5. The carrier is also liable, notwithstanding paragraph 3 of this article, for all or part of the loss, damage, or delay if:*
>
> *(a) The claimant proves that the loss, damage, or delay was or was probably caused by or contributed to by (i) the unseaworthiness of the ship; (ii) the improper crewing, equipping, and supplying of the ship; or (iii) the fact that the holds or other parts of the ship in which the goods are carried,* ***or any containers supplied by the carrier in or upon which the goods are carried, were not fit and safe for reception, carriage, and preservation of the goods****; and*
>
> *(b) The carrier is unable to prove either that: (i) none of the events or circumstances referred to in subparagraph 5 (a) of this article caused the loss, damage, or delay; or (ii) it complied with its obligation to exercise due diligence pursuant to article 14.* [emphasis added]

Article 17.5(a) in essence provides that, when the carrier has breached his duty to provide cargoworthy containers, he cannot avail of the liability-exemption defences listed in Article 17.3, which are similar to the Hague-Visby Rules defences laid down in Article IV rule 2. This rule is, however, subject to two conditions: (1) the carrier failed to prove the lack of causation between the breach and the resulting loss, damage or delay, and (2) the carrier failed to prove that he exercised due diligence to make and keep any carrier-supplied containers fit and safe for the reception, carriage, and preservation of the goods.[291] The Rotterdam Rules do not elaborate on the standard of proof set by the phrase "probably caused", and, thus, the issue of causation is left to be defined by national law.[292] Interestingly, Article 15.5 and Article 15.6 suggest that under the Rotterdam Rules, the seaworthiness obligation is no longer an overriding obligation and, provided there is another contributory cause for the damage or loss besides the unseaworthiness, the carrier may be only partially liable.[293] This is a fundamental difference as compared to the Hague-Visby Rules.

8.3 The evidentiary effect of the B/L and the contents of a container

As observed thus far, the Rotterdam Rules codify much of what has been established by means of courts' interpretation of the various Hague-Visby Rules

[291] See Article 17.5(b), the Rotterdam Rules.
[292] Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel – *'The Rotterdam Rules: The UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'*, Sweet & Maxwell (2010), p.113, para. 5.094;
[293] Article 15.5: *"The carrier is also liable […] for all or part of the loss, damage, or delay if…"*; Article 15.6: *"When the carrier is relieved of part of its liability pursuant to this article, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable pursuant to this article."* This is a position, which is different to the one under the Hague-Visby Rules where a carrier will typically be liable in full if there is a breach of the unseaworthiness obligation regardless whether this breach was only a contributory cause for the loss or damage.

provisions. The carrier's right to qualify the information on the bill of lading, which relates to the goods and, in particular, to containerized goods, makes no exception. While the Hague-Visby Rules acknowledge in general that a carrier shall not be obliged to accept particulars inserted in the bill of lading, which he has reasonable grounds of suspecting to be inaccurate (Article III rule 3 HVR), the Rotterdam Rules provide for specific rules addressing containerized cargo (Article 40 RR):

> ***Article 40***
> ***Qualifying the information relating to the goods in the contract particulars***
>
> […]
>
> *3. When the goods are not delivered for carriage to the carrier or a performing party in a closed container or vehicle, or when they are delivered in a closed container or vehicle and the carrier or a performing party actually inspects them, the carrier may qualify the information referred to in article 36, paragraph 1, if:*
>
> *(a) The carrier had no physically practicable or commercially reasonable means of checking the information furnished by the shipper, in which case it may indicate which information it was unable to check; or*
>
> *(b) The carrier has reasonable grounds to believe the information furnished by the shipper to be inaccurate, in which case it may include a clause providing what it reasonably considers accurate information.*
>
> *4. When the goods are delivered for carriage to the carrier or a performing party in a closed container or vehicle, the carrier may qualify the information referred to in:*
>
> *(a) Article 36, subparagraphs 1 (a), (b), or (c), if:*
>
> *(i) The goods inside the container or vehicle have not actually been inspected by the carrier or a performing party; and*
>
> *(ii) Neither the carrier nor a performing party otherwise has actual knowledge of its contents before issuing the transport document or the electronic transport record; and*
>
> *(b) Article 36, subparagraph 1 (d), if:*
>
> *(i) Neither the carrier nor a performing party weighed the container or vehicle, and the shipper and the carrier had not agreed prior to the shipment that the container or vehicle would be weighed and the weight would be included in the contract particulars; or*
>
> *(ii) There was no physically practicable or commercially reasonable means of checking the weight of the container or vehicle.*

Article 40 consists of rather complex provisions which, from the perspective of containerized cargo, could be construed in the following manner.

In general, the carrier *shall* qualify the cargo-related information on the bill of lading (regardless whether it is a containerized shipment or not) in order to indicate that he assumes no responsibility for the accuracy of that shipper-provided information if: (1)

the carrier has actual knowledge of any false or misleading material statement in the bill of lading, or (2) he has reasonable grounds to believe so.[294]

Secondly, with regard to goods delivered in a closed container, which the carrier actually inspects, the carrier *may* qualify the information on the bill of lading relating to the description of such goods, the leading identification marks, the quantity or number of packages, and the weight of the goods (if furnished by the shipper) if: (1) the carrier has no physically practicable or commercially reasonable means of checking that information, or (2) he has reasonable grounds to believe that such information is inaccurate.[295]

Thirdly, when the goods inside the container have not been actually inspected by the carrier and he has otherwise no knowledge of its contents before issuing the bill, the carrier *may* qualify the information on the bill of lading relating to the description of the goods, the leading identification marks, and the quantity or number of packages.[296] In addition to that third scenario, the carrier may qualify also the information relating to the weight of the goods (if furnished by the shipper) provided that (1) the carrier did not weigh the container, and the shipper and carrier had not agreed, prior to the shipment, to weigh the container and include the weight in the contract particulars, or (2) there was no physically practicable or commercially reasonable means of checking the weight of the container.[297]

By regulating so strictly the carrier's duty and/or right to qualify the cargo-related information on the bill, Article 40 of the Rotterdam Rules seeks to diminish the possible disputes between carriers and shippers as to the circumstances when such qualification is necessary.[298] Such disputes may be fostered, for example, by the shipper's need to procure an unqualified document of transport in connection with a contract of sale, under which the latter is a seller. Such contracts are very often carried out on the basis of a credit-payment arrangement, known as a Letter of Credit, which may require a clean transport document to be procured in order for the payment to be effectuated on behalf of the buyer. The reason why Article 40 distinguishes between a duty (*'shall'*) and a right (*'may'*) to qualify the information in the contract particulars is explained with the need to protect third party bill of lading holders, whose rights may be affected by the respective information.[299] Therefore, when the carrier has actual knowledge or reasonable grounds to believe that such information is false or misleading, he is bestowed a duty to give notice to any third party by qualifying the bill,[300] whereas when the carrier has no reasonable means to check and verify the accuracy of this information, he is not obliged to qualify the bill but he has the right to do so.

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[294] Article 40.1.
[295] Article 40.3.
[296] Article 40.4(a).
[297] Article 40.4(b).
[298] Prof. Richard Williams – *'Transport Documentation – the New Approach'*, published in *'A New Convention for the Carriage of Goods by Sea – The Rotterdam Rules: An Analysis of the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea'* (edited by Prof. D. Rhidian Thomas), Lawtext Publishing Limited (2009), Chapter 8, pp. 190-224, at p. 208.
[299] *Ibid.*
[300] Although the Rules do not specify the consequences for not qualifying the transport document's particulars when the carrier is required to do so, the sanction for the carrier's breach of this duty will obviously be that the transport document will be considered a conclusive evidence vis-à-vis a third party under Article 41.

Conclusion

The innovations in the maritime industry and the changes in the commercial practices require a critical reassessment of the Hague-Visby Rules. Such a need is not surprising given the fact that the Rules were drafted and implemented many decades ago and are, thus, adapted to different commercial and business realities. As a consequence, courts are often assigned with the task to interpret the meaning of the Convention in a way so as to adapt the wording as set forth therein to the modern commercial environment.

The various examples, provided throughout the thesis, of different legal systems show that contracts of carriage are interpreted according to the legal family to which the court belongs. Common law countries typically adhere to freedom of contract and the force of precedent, whereas dispute resolution in civil law countries is dependent mainly on the mandatory force of the legal provision rather than on the contractual provision. In other words, civil law jurisdictions tend to interpret literally the relevant provisions of the Hague-Visby words, while common law jurisdictions give more room in their analysis to the terms of the bill of lading. This divergence becomes problematic also because the Rules themselves are intended to create a balance between the carrier's interests and the shipper's interests on the basis of fairness rather than on the basis of freedom of contract. This balance of interests was established through a mandatory liability regime with minimum liability from which the parties cannot escape. It seems that, together with all the numerous problems to be solved by a future legislative reform, the freedom of contract within the ambit of the Hague-Visby Rules remains a fundamental issue. That is why very often the reasoning of English courts slides along the razor-edge of the guardian of the statutory minimum liability (Article III rule 8) in an attempt to keep up with practice and modern-day contractual relations such as the FIOS(T) clause, for example. The problem with having the need of too much interpretation of the current legislation, however, is that eventually this may result in a distortion of the balance between the carrier's and the shipper's interests, which becomes counterproductive.

The general conclusion is that, with respect to the obligations of the carrier over the cargo, there is less need for the weaker party under a contract of carriage to be protected by today's international sea transport legislation. The studies conducted in *Chapter IV* and *Chapter V*, in particular, established that cargo interests nowadays are better off than their counterparts several decades ago at least when carriage on deck is concerned, or when one considers the containerization revolution.

A very important question, which also summarizes the problems regarding the legal lacuna found in regulating of some of the obligations of the carrier, is whether the shipping business is in need of more mandatory rules today, or whether overregulation may turn out to be counterproductive. This certainly is a policy issue. A good example is the enforceability of FIOS(T) clause and all the resulting implications discussed in the relevant chapter. On the one hand, one may be a proponent of the codified solution provided by the Rotterdam Rules, which may become the future liability regime

regulation maritime transport of goods. However, other opinions, which can be heard particularly in common law countries, may find such codification redundant as all matters regarding the applicability of free-in/free-out terms have been clearly settled in case law (*Jordan II*, *Eems Solar*). Similar problems were found in the other cargo-related aspects of the carrier's obligations that are discussed in the thesis as well.

Thus, the current study on the carrier's obligations over the cargo has revealed a problem of a more general nature. Considering that the drafting of the Rotterdam Rules was a compromise reached on an international level, now the signatory states may need to face yet another compromise in deciding whether to ratify the Rules. Should we sacrifice legal certainty and rely on the current system established by the Hague-Visby Rules and shaped mostly by jurisprudence as a source of law, or should we risk overregulation through a very complex *maritime plus* regime whose benefits may not sufficiently exceed the possible shortcomings such as possible increased freight?

In essence, the Rotterdam Rules offer new solutions to the problems raised in this thesis, and codify much of what was previously decided under the Hague-Visby Rules through interpretation by the courts. In other words, the gaps in law that were opened by the quick development of the entire shipping industry were previously bridged by means of the court's interpretation (or, we can refer to the well-known principle – courts should not legislate but are allowed to interpret only within a legal lacuna), whereas, under the Rotterdam Rules, these gaps are filled by means of legislation.

Beyond doubt, there is an obvious need for uniformity in the shipping sector. It was evidenced in the current thesis that various national jurisdictions offer different solutions to the problems that are created when there is a hiatus between law and practice. A uniform legal framework regulating international transport that is similarly applied will help minimizing these different outcomes which will result in more legal certainty and predictability and less costs for litigation. The latter certainly serves the commercial needs and public interest, accordingly. Indeed the Rotterdam Rules are a very long and rather complex compromise between the drafting parties but for the time being it seems to be the best that could be offered in response to the need of uniformity and the need of addressing the technical and commercial developments that has occurred since the mid-1920s.

Having said that, an account must be given of the fact that the Rotterdam Rules suffer from being not so friendly to the carrier, which is a trait that may allot the new Convention the same fate as that of the Hamburg Rules. It also seems that the Rotterdam Rules are tailored for big shipping companies which have enough commercial power and infrastructure to cover the entire shipping chain. However, because of the extended scope of the Convention, smaller carriers would exposed to much more risks outside the sea leg of the journey, where they have little or no control of the situation. This means that such carriers will be more likely to be liable for failure to fulfill their cargo-related obligations, and this increased risk can easily be transformed into higher freight rates. To predict the better alternative is a hefty task but one thing is for sure – there is no right choice in absolute terms. In today's complex shipping environment there will always be something to sacrifice before attaining the desired benefits.

SUMMARY

Introduction

The present doctoral thesis contains a research study on the obligations of the sea carrier over the cargo that he has undertaken to carry on board the vessel. The introductory chapter presents the topic and the scope of the thesis. It also familiarizes the reader with the problems that will further be discussed in the following chapters. A starting point is the importance of shipping for international commerce and also for the nowadays industrialized world in general. Then, it is submitted that the topic discussed in the thesis is a fundamental part of any shipping arrangement. The obligations that a sea carrier owes to the cargo interests with regard to a particular shipment form a significant part of the content of the contract of carriage.

The introductory chapter also outlines the scope of the thesis and gives the parameters and limiting factors used to determine the legal problems that are addressed in the discussion in order to ensure that a streamline, logical and comprehensive outline is achieved. In particular, in the analysis of the problems discussed, the following methodological principles are taken into consideration. Firstly, where possible, attempt is made to distinguish between the carrier's obligations and the pertaining liability. It must be conceded that both areas of research are indeed closely related and very often the legal analysis will require taking closer look at the carrier's liability for breaching any of his cargo-related obligations. Secondly, the current thesis focuses on the obligations of the carrier over the goods carried (Art.III rule 2 HVR) and does not aim to analyze the other fundamental duty of the carrier, which is to provide a seaworthy vessel (Art.III rule 1 HVR). In particular, it is important to note that the seaworthiness obligation will be discussed only to the extent that such discussion can reveal the essence and nature of the cargo-related duties from a comparative perspective. Thirdly, the study will analyze the leading international liability regime regulating sea carriage, the Hague-Visby Rules. However, each chapter of the thesis will also extensively cover the relevant provisions of the Rotterdam Rules. The rationale behind including the Rotterdam Rules approach regarding the carrier's cargo-related obligations is the additional perspective that such an analysis adds. In essence, what is important about the methodology employed in this doctoral thesis is that it does not attempt to carry out a comparative study between the two regimes but aims to demonstrate, *inter alia*, how the law in that particular area would change should the Rotterdam Rules ever come to force.

Chapter I: General Introduction to Bill of Lading Law

The first chapter of the thesis functions as a theoretical background, and serves also as a reference point allowing even readers with average knowledge of shipping law to grasp the intricacies of the more subtle problems that are discussed further. To the extent possible, this chapter adds to the book a source of general shipping knowledge, which is intended to limit the instances when the reader has to resort to external materials in order to clarify essential notions and positions regarding the carriage of goods by sea. The aim of the first chapter is not simply to provide, in a concise manner,

knowledge on basic concepts in the area of shipping in general but also to clarify areas in the carriage of goods that are relevant precisely to the topic of the current thesis – the carrier's obligations over the cargo.

To be more specific, Chapter I deals with the contract of carriage and the related transportation documents as well as with the contractual parties. First, the definitions of the various parties are laid down and explained although the same may have mostly theoretical significance. Then a division is made between the two major contractual arrangements in the area of carriage of goods by sea – a bill of lading and a charter party. Section 2 of Chapter I explains in particular the essence of these two documents, their functions, types as well as their characteristics as opposed to other transport documents, and also the interplay between bills of lading and charter parties.

To sum up, this chapter provides information about what is commonly referred to as "dry shipping", or in other words the legal problems associated with contractual or commercial matters, which is the area of research of the current thesis.

Chapter II: The Carrier's Obligations over the Cargo under the Hague-Visby Rules and the Rotterdam Rules

Chapter II of the dissertation extensively lays down the legal framework of the carrier's obligations over the cargo. The chapter first establishes where the Hague and Hague-Visby Rules are situated in the fragmented law on international sea transport. To that regard, substantial information is provided as to development and evolution of the law regulating international carriage of goods by sea, in particular, the Hague/Hague-Visby Rules, the Hamburg Rules, and the Rotterdam Rules. This section also explains why the Hague-Visby Rules, being the leading maritime liability regime, form a central part of the analysis, while at the same time the relevant provisions of the Rotterdam Rules are also extensively covered. Among others, taking into consideration the Rotterdam Rules position adds up to the academic debate a specific parallel between the two regimes from the perspective of the carrier's cargo-related obligations.

Section 3 of Chapter II is dedicated to common law primarily because the common law position is illustrative for the various cargo-related provisions found in the liability regimes discussed further, and because it may also be very helpful to understand the rationale behind these provisions. However, this section is concise and does not aim at providing a comprehensive statement of the common law position. The reason for putting less emphasis on the problems that arise under common law is that, despite the evolution of common law, England and Wales developed a separate body of law on admiralty, on which the present thesis is focused.

Sections 4 and 5 explain in detail not only the specific provisions embodying the duty to exercise care for the cargo (*i.e.* Article III rule 2 HVR; Articles 11 and 13 RR) but also the environment in which these provisions are found and operate. Therefore, a more extensive approach is undertaken with regard to the entire Article III of the Hague-Visby Rules as well as with regard to Article II. Thus, section 4 refers to all eight rules laid down in Article III while a more thorough analysis is, naturally, dedicated to rule 2. In particular, subsection 4.3 reveals the nature of the obligations set in Article III rule 2 as well as the meaning of the words "properly and carefully"; the relationship between the obligation and the defences available to the carrier under Article IV; the

transferability of the duty; the period throughout a carrier is under this duty, and the burden and order of proof. Reference is also made to the cargo-related obligations under charter parties and the specific problems that may arise in that context.

Similarly, Article 11 (the obligation to carry and deliver the goods), Article 12 (the period of responsibility of the carrier) and Article 13 (the obligation to exercise care for the cargo) of the Rotterdam Rules' Chapter 4 are discussed in its entirety in section 5 of the thesis. Problems such as the identity of the carrier and the burden of proof are also addressed. In this way, it is also shown how the entire architecture of the Hague-Visby Rules, on the one hand, and of the Rotterdam Rules, on the other, differ when it comes down to codifying the carrier's duty to exercise care for the cargo.

Chapter III: The FIOS(T) clause

Chapter III begins by explaining the quintessence and purpose of the FIOS(T) clause as well as of its derivatives such as FIO, FI, FO, FILO, *etc*. The chapter establishes the amendments that such a provision brings to the contract of carriage with regard to costs, risks and responsibility for handling the goods as opposed to the same under liner terms (gross terms).

In section 3, it is explained why the FIOS(T) clause is a problem within the context of the Hague-Visby Rules. That part of the chapter shows that, when courts interpret a FIOS(T) clause in the light of Article III rule 2 coupled with Article III rule 8, such transfer or delegation of cargo-related duties may be declared contrary to the provisions of the Rules and, thus, null and void at least under some jurisdictions. On the other hand, however, such contractual arrangements are often seen in practice, which is the reason why the chapter speaks of a "tension" between the Rules and the FIOS(T) clause. Examples provided from French law, US law, and Dutch law show that the FIOS(T) clause, being an exception to the Rules, has been addressed differently under various national legal systems. Furthermore, it is pointed out also that the attitude of both courts and scholars is far from unanimous with regard to FIOS(T) terms.

The entire section 4 of Chapter III focuses on how English jurisprudence has defined the limits of the carrier's responsibilities over the cargo. In order to analyze how English courts treat FIOS(T) clauses, a detailed case study is carried out where thorough attention is devoted to the milestone cases *The "Jordan II"* and *The "Eems Solar"*, both of which have definitively recognized FIOS(T) terms as a lawful commercial arrangement. The study follows carefully the court's reasoning in both decisions because it is illustrative of how the interpretation of the court provides a solution where a vacuum exists between legislation and commercial practices.

Furthermore, this section also addresses particular problems that pertain to FIOS(T) clauses found in charter parties as well as to the wording, interpretation and incorporation of such clauses into a bill of lading contract with a third party. In other words, the discussion covers the transfer of cargo-related operations not only from the carrier to the cargo interests but also from the shipowner to the charterer. In particular, the analysis reveals how courts interpret provisions and wording in the contract of carriage that attempt to qualify the FIOS(T) clause such as "under the supervision of the master", or "under the responsibility of the master", or "under the directions of the

master", or "to the satisfaction of the master", *etc.*; as well as to what extent such words can indeed affect the transfer of responsibility over the cargo-handling operations.

Finally, the chapter analyzes the respective provisions of the Rotterdam Rules regarding the acceptability of FIOS(T) terms, and it gives an appraisal of the approach undertaken by the new Convention as opposed to the one under Hague-Visby Rules.

Chapter IV: The Carrier's Obligations over Deck Cargo

The fourth Chapter focuses on the problems associated with the carriage of cargo on deck and, in particular, the obligations of the carrier over such cargo. The discussions on the legislative and judicial issues regarding deck cargo are preceded by an explanation of the notions of deck and deck carriage, and of the various reasons and considerations behind shipping goods on the deck of a commercial seagoing vessel (section 2).

Section 3 then lays down the position under the Hague/Hague-Visby Rules with regard to deck cargo, which is considered an exception to those Rules, and explains why such carriage arrangement are excluded from the scope of the Convention. The two requirements as laid down in Article I(c) HVR make it possible to distinguish between authorized and unauthorized stowage (carriage) on deck as well as between declared and undeclared depending on whether the goods are (1) stated as being carried on deck, and (2) in fact so carried. The problems which a Clause Paramount can bring to this division are also addressed and clarified.

The current law on deck cargo is then laid down in section 4 of the chapter. This part emphasizes on the fact that new technology and modern shipping practices have remodeled the old doctrine on deck cargo. In that regard, a factual study is carried out to assess the risks relating to the carriage on deck, taking into account statistical data regarding the incidence of lost deck cargo. The design of contemporary vessels is also taken into account in support of the argument that deck carriage is another sphere of shipping where a hiatus between international law and commercial practice is present.

Section 5 examines the evolution of the traditional deck cargo doctrine under English law, whereby the carrier is allowed to carry goods on deck only (1) when there is an express agreement between the contractual parties, or (2) when there is a universal custom to carry on deck that is binding within a particular trade. Furthermore, the doctrines of fundamental breach and deviation are carefully considered as well as their impact on the law on deck cargo. How English courts interpret deck cargo covered by a clean bill of lading, on the one hand, and by a claused bill, on the other, is further discussed in subsection 5.2; in particular, the effect of liberty clauses in English case law. The effect of deck carriage on the carrier's obligation to care for the goods under Article III rule 2 as well as the availability of the carrier's defences for goods carried on deck form a notable part in the discussion. Finally, the specific problems of deck cargo under voyage and time charter parties are addressed.

Section 6 demonstrates how deck carriage is regulated in other jurisdictions as well. For that purpose, the national regimes in France, Germany, the Netherlands, Norway, and Sweden are analyzed and compared. It is noteworthy that this section puts a bigger emphasis on the comparative element when juxtaposed to the problems discussed in other chapters of the dissertation. This is necessitated by the fact that the

problems that deck carriage poses under the Hague-Visby Rules are often related to the issue that declared deck carriage may step outside the ambit of the Rules and be regulated by the applicable national regime.

The last section of Chapter IV examines the position taken by the Rotterdam Rules with respect to deck cargo. It is shown that the drafters of the new maritime plus Convention have taken a modernized approach in that regard, which is based to a large extent on today's shipping practice and which takes into account also the body of case law adjudicated by English courts that is discussed in the previous sections of the current chapter. Thus, section 7 aims also at assessing the advantages of the new Convention in that respect.

Chapter V: The Carrier's Obligations over Containerized Cargo

Chapter V is dedicated to the idiosyncrasies of containerized transport in the context of the carrier's cargo-related obligations. The process of containerization had an unparalleled impact not only on the shipping business but, more generally, on international trade and even social and economic development because of the irreversible changes that it brought to the modern world. Therefore, section 2 of the present chapter provides comprehensive information on the advent of the container revolution in the second half of the XX century as well as on the history and development of containerized shipping and its impact on today's international shipping and trade.

Section 3 then familiarizes the reader with certain technical aspects of the parameters of the shipping container such as its structure, type, and use. Substantial information is also provided with regard to the modern containerships and the necessary infrastructure, which allows today's swift handling of containerized cargo. The level of detail of this technical information is consistent with its relevance to the legal problems discussed afterwards.

The following section encompasses the first group of problems which represent the core issue in this chapter. This is the problem of conceptualizing the shipping container under the Hague Rules and the Hague-Visby Rules. Most notably, section 4 lists the decisive factors for determining the nature of the shipping container either as a part of the vessel or part of the cargo. Defining how containers are considered under the Rules (for instance, to what extent a container can be considered a package) has relevance to all following issues with respect to the regulation of these standardized metal or aluminium boxes.

In section 5, it is submitted that the transport of containers brought changes also to the traditional model of the contract of carriage. Accordingly, the modified period of responsibility of the carrier is examined as well as the specific characteristics of through bills of lading and combined bills of lading. The contractual terms that designate the respective container service (*i.e.* movement codes such as CY, CFS, LCL, and FCL) are also extensively covered and explained.

In section 6, particular attention is dedicated to the obligation laid down in Article III rule 2 to *"properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried"* as applied to containerized cargo. The application of this bundle of duties, which are collectively referred to as the duty to care for the cargo, is examined in detail both with regard to the containers themselves and with regard to the

goods stowed inside the containers. The implications derived from this analysis show that the following factors are decisive in interpreting Article III rule 2 when cargo carried in containers is involved: which party provided the container; which party stuffed the container; and what are the contractual terms designating the container service.

Another issue considered by this chapter is the problem of weighing the containers. It is submitted how crucial it is for the stowage plan, for the stability of the vessel, and for the entire journey that the correct container weight is indicated on the manifest list. It is also clarified that weighing the container is a duty regulated under SOLAS, and it is owed by the shipper. This means that the carrier owes no such duty to weigh the containers before loading them on board; nor does Article III rule 2 imply any such duty.

The last section of Chapter V discusses the provisions of the Rotterdam Rules which concern the carriage of containers. The regulation of containerized shipments is a field where the Rotterdam Rules are expected to manifest to a big extent their nature as a modernized liability regime. In particular, section 8 deals with the problems of whether containers are perceived as a package or not (Article 1.24, Article 1.26, Article 59); with the carrier's obligations regarding containers (Article 13, Article 14, Article 17.5) as well as with the evidentiary effect of the bill of lading with regard to the contents of a container (Article 40).

Conclusion:

The final chapter of this doctoral thesis summarizes the observations and implications derived from the various discussions in the previous chapters (*e.g.* FIOS(T), deck carriage, containers) and the conclusions made thereof. The general and most pronounced remark is that a legal lacuna is observed between statutory law and commercial practice in almost all areas that were covered by the thesis. Furthermore, the noticeable lack of uniformity between the various legal systems is also summarized.

Having pinpointed these main problems associated with the carrier's cargo-related obligations under the Hague-Visby Rules, the concluding chapter seeks to establish whether the new solutions offered by the Rotterdam Rules are capable of bridging the gaps between law and practice and of promoting uniformity. The chapter does not deny the virtues of the new Convention, which will serve well the commercial needs in that particular area. However, it is noted that the solutions offered with regard to the specific problems raised in the current thesis should be viewed also in the light of the entire impact that the Rotterdam Rules would have on the shipping industry should they be ratified and come to force. In other words, any such discussion about the Rotterdam Rules and the specific area of the carrier's obligations over the cargo should also consider the overall shortcomings of the new Convention, which is a topic beyond the scope of the current thesis.

Taking into account how academically well drafted the Rotterdam Rules are, it is submitted that closing the gap between law and practice regarding the carrier's cargo-related obligations may be achieved by ratifying the new Convention but this will not inevitably become a panacea. It is noted that because of the long and complex structure of these Rules, there may well appear additional problems in other areas regulated by the Rules. Furthermore, the process of achieving future modernization and uniformity in

international sea transport law is subject also to the new Convention assuming the status of a leading liability regime, and not simply to making this convention enter into force.

SAMENVATTING

Inleiding

Het onderhavige proefschrift behelst een onderzoek naar de verplichtingen van de zeevervoerder ten opzichte van de vracht die hij aan boord van het schip vervoert. In het inleidende hoofdstuk worden het onderwerp en de reikwijdte van het onderzoek nader uiteengezet. Bovendien worden de onderwerpen die in de volgende hoofdstukken aan de orde zullen komen geïntroduceerd. Vertrekpunt is het belang van de scheepvaart voor de internationale handel en de vandaag de dag geïndustrialiseerde wereld in het algemeen. Vervolgens wordt verdedigd dat het onderwerp van dit proefschrift een fundamenteel onderdeel is van iedere scheepvaartovereenkomst. De verplichtingen die de zeevervoerder heeft ten opzichte van de vrachtbelangen van een bepaalde verzending vormen een belangrijk deel van de inhoud van de vervoersovereenkomst.

In het inleidende hoofdstuk wordt ook de reikwijdte van het proefschrift beschreven en wordt uiteengezet welke parameters en beperkende factoren zijn gebruikt om de juridische problemen die in de discussie naar voren komen te bepalen om ervoor te zorgen dat een gestroomlijnd, logisch en samenhangend geheel wordt bereikt. Bij de analyse van de problemen die aan de orde komen, zijn in het bijzonder de volgende methodologische beginselen in aanmerking genomen. In de eerste plaats is waar mogelijk geprobeerd onderscheid te maken tussen de vervoerders verplichtingen en de aansprakelijkheid ter zake. Toegegeven, beide onderzoeksgebieden houden nauw verband met elkaar en zeer dikwijls zal de juridische analyse vergen dat tevens wordt gekeken naar de aansprakelijkheid van de vervoerder voor de niet-nakoming van zijn vrachtgerelateerde verplichtingen. In de tweede plaats wordt in dit proefschrift de nadruk gelegd op de verplichtingen van de vervoerder ten opzichte van de vervoerde goederen (Art. III(2) Hague-Visby Rules (HVR)) en is het doel niet gelegen in het analyseren van die andere fundamentele plicht van de vervoerder, te weten zorg te dragen voor een zeewaardig schip (Art. III(1) HVR). Het is van belang dat de verplichting ten aanzien van de zeewaardigheid enkel aan de orde komt waar dit de kern en het karakter van de vrachtgerelateerde verplichtingen kan verduidelijken vanuit een vergelijkend perspectief. In de derde plaats staat het leidende internationale aansprakelijkheidsregime met betrekking tot zeevervoer in dit onderzoek centraal, te weten de Hague-Visby Rules. Dat laat echter onverlet dat in ieder hoofdstuk van dit proefschrift ook de relevante bepalingen van de Rotterdam Rules uitgebreid aan bod komen. De reden om ook de benadering van de Rotterdam Rules met betrekking tot de vrachtgerelateerde verplichtingen van de vervoerder te bespreken is dat dit een extra perspectief aan de analyse toevoegt. Van belang is dat in dit proefschrift niet wordt gepoogd een vergelijkend onderzoek naar de twee regimes te doen, maar dat – onder meer – wordt aangegeven hoe het recht op dit specifieke terrein zal veranderen, mochten de Rotterdam Rules ooit van kracht worden.

Hoofdstuk I: Algemene inleiding op het cognossement

Het eerste hoofdstuk van dit proefschrift geeft theoretische achtergrondinformatie. Het dient daarbij als referentiekader om lezers met een gemiddelde kennis van koopvaardijwetgeving in staat te stellen de subtiliteiten en ingewikkeldheden te begrijpen van de problemen die later worden besproken. In beperkte mate geeft dit hoofdstuk ook algemene informatie over goederentransport over zee, vooral bedoeld om te voorkomen dat de lezer al te vaak externe bronnen moet raadplegen om wezenlijke zaken te begrijpen die daarop betrekking hebben. Het doel van dit eerste hoofdstuk is niet alleen om beknopte kennis over de basisbegrippen van de koopvaardij te geven, maar ook om begripsmatige helderheid te scheppen in het specifieke onderwerp van dit proefschrift: de verplichtingen van de vervoerder (vervrachter) met betrekking tot de lading.

Concreter gezegd: Hoofdstuk I gaat over de koopvaardijovereenkomst in het algemeen, de bijbehorende transportdocumenten, alsmede de betrokken partijen. Allereerst worden de definities van de verschillende partijen gegeven en toegelicht, al zijn die vooral van theoretisch belang. Vervolgens wordt er onderscheid gemaakt tussen de twee voornaamste vormen van overeenkomst met betrekking tot het goederenvervoer over zee: het cognossement of beurtvaartadres (Bill of Lading) en de bevrachtingsovereenkomst (Charter Party). Sectie 2 van Hoofdstuk 1 zet de essentie van beide documenten nader uiteen, de vormen waarin ze voorkomen, de verschillen met andere typen transportdocumenten, en tevens de wisselwerking tussen cognossement en bevrachtingsovereenkomst.

Samenvattend: dit hoofdstuk verschaft inzicht in wat gewoonlijk ‘dry shipping’ genoemd wordt, of – nauwkeuriger gezegd – in de juridische problemen die verbonden zijn met de bijbehorende contractuele en commerciële koopvaardijzaken, want dat is het onderwerp waarop dit proefschrift zich met name richt.

Hoofdstuk II: Verplichtingen van de vervoerder met betrekking tot de lading onder de Hague Visby Rules en de Rotterdam Rules

Dit tweede hoofdstuk geeft een uitgebreide beschrijving van het juridische kader van de verplichtingen die de vervoerder heeft met betrekking tot de lading. Het hoofdstuk stelt allereerst vast welke plaats de Hague/Hague Visby Rules hebben in de gefragmenteerde wetgeving die de internationale koopvaardij beheerst. Met het oog daarop wordt uitgebreid ingegaan op de aanpassingen en ontwikkelingen van de betreffende wetgeving; het betreft met name de Hague/Hague Visby Rules (HVR), de Hamburg Rules (HR) en de Rotterdam Rules (RR). In de betreffende sectie wordt ook ingegaan op de vraag waarom de Hague-Visby Rules – de voornaamste wet- en regelgeving op juridisch-maritiem gebied die de kern van de analyse uitmaken – in samenhang met de bepalingen van de Rotterdam Rules worden besproken. De vergelijking geeft onder andere interessante aanknopingspunten voor het wetenschappelijk debat over vervoerdersverplichtingen met betrekking tot de lading.

Sectie 3 van Hoofdstuk II is gewijd aan het gemene recht, voornamelijk omdat het gemeenrechtelijke standpunt illustratief is voor de verschillende ladingsgerelateerde bepalingen die kenmerkend zijn voor de aansprakelijkheidswetgeving die later aan bod komt, en ook omdat het behulpzaam kan zijn om de gedachtegang achter deze

bepalingen te begrijpen. Deze sectie is niettemin beknopt gehouden en beoogt niet een uitgebreid overzicht te geven van het gemene recht. De reden om niet te veel nadruk te leggen op de problemen die voortvloeien uit het gemene recht, ondanks de ontwikkeling die het gemene recht heeft doorgemaakt, is dat Engeland en Wales een eigen maritieme wet- en regelgeving hebben ontwikkeld, en daarop richt dit proefschrift zich met name.

De secties 4 en 5 geven een gedetailleerde uitleg over de specifieke bepalingen die de taak om zorg te dragen voor de lading omschrijven (bijv. Art. III (2) HVR; Art. 11 en 13 RR), en tevens over de situaties waarbinnen deze bepalingen gelden of toepasselijk zijn. Om die reden wordt dieper ingegaan op de artikelen II en III van de Hague Visby Rules. Sectie 4 beschrijft alle acht Regels van Artikel III, waarbij de meeste aandacht uitgaat naar Regel 2. Dit gebeurt met name in subsectie 4.3 waarin ook nader wordt ingegaan op de aard van de verplichtingen, de betekenis van de woorden "properly and carefully" (correct en zorgvuldig), de samenhang tussen vervoerdersverplichting en de mogelijkheden van verweer die hem ter beschikking staan onder Artikel IV, de mogelijkheden om de zorgtaak over te dragen, de tijdsspanne van de verplichting, en de bewijslast en bewijslastverdeling. Tevens komen de ladingsgerelateerde verplichtingen van bevrachtingsdocumenten (Charter Parties) aan de orde en de specifieke problemen die daarbij kunnen optreden.

Op vergelijkbare manier worden in sectie 5 de Artikelen 11 (verplichting tot vervoer en levering), 12 (tijdsbestek van de verantwoordelijkheid van de vervoerder) en 13 (de verplichting om goede zorg te dragen voor de lading) uit Chapter IV van de Rotterdam Rules in extenso besproken. Problemen die betrekking hebben op de identiteit van de vervoerder en de bewijslast komen tevens aan de orde. Zodoende wordt duidelijk hoe aan de ene kant de gehele opbouw van de Hague Visby Rules en aan de andere kant die van de Rotterdam Rules, onderling verschillen met betrekking tot de vastlegging van de vervoerdersverplichting om goede zorg te dragen voor de lading.

Hoofdstuk III: De FIOS(T)-clausule

Hoofdstuk III begint met een uitleg van doel en wezen van de FIOS-clausule, alsmede van haar afgeleiden FIO, FI, FO, FILO enz. (FIOS betekent *Free In and Out Stowed* en het houdt in dat het laden en stuwen van de lading en het lossen van de lading geschiedt voor rekening en risico van de bevrachter, zijnde niet de vervrachter of vervoerder.) In dit hoofdstuk worden de verschillen vastgesteld die deze bepaling meebrengt ten opzichte van vergelijkbare (bruto)lijnvaartvoorwaarden, met betrekking tot kosten, risico's en goederenverantwoordelijkheid.

In sectie 3 wordt uitgelegd waarom de FIOS-clausule een probleem vormt binnen de context van de Hague Visby Rules. Deze sectie laat zien dat wanneer rechtbanken de FIOS-clausule interpreteren in het licht van Artikel III, Regel 2, in samenhang beschouwd met Artikel III, Regel 8, dat dan de overdracht of uitbesteding van ladingsgerelateerde zorgtaken mogelijk strijdig is met de bepalingen van de Rules, en daarmee ten minste nietig en ongeldig is onder sommige jurisdicties. Maar in de praktijk worden zulke lastige contractuele arrangementen meestal wel opgelost, reden waarom in dit hoofdstuk sprake is van een 'spanning' tussen de HV-Rules en de FIOS-clausule. Er worden voorbeelden gegeven uit de jurisprudenties van Frankrijk, de Verenigde Staten en Nederland om te laten zien dat de FIOS-clausule, die een uitzondering behelst op de

HV-Rules, verschillend wordt behandeld binnen de verschillende nationale jurisdicties. Ten slotte wordt er op gewezen dat zowel binnen de rechtspraak als binnen de wetenschap verschillend wordt gedacht over de FIOS-bepalingen.

Sectie 4 is in haar geheel gewijd aan de manier waarop de Engelse jurisprudentie de grenzen van de vervoerdersverantwoordelijkheid met betrekking tot de lading heeft gedefinieerd. Om te kunnen analyseren hoe de Engelse rechtspraak de FIOS-clausele behandelt, wordt een gedetailleerde analyse gemaakt van enkele cruciale uitspraken, zoals *The Jordan II* en *The "Eems Solar"*, die beide zonder restricties zijn uitgegaan van de FIOS-clausule als een wettig commercieel arrangement. Dit onderzoek gaat zorgvuldig de overwegingen na die de rechtbank heeft gevolgd in beide uitspraken omdat het duidelijk maakt hoe hun interpretaties een oplossing bieden in die gevallen waar een vacuüm heerst tussen de juridische en de commerciële praktijk.

Verder gaat deze sectie ook in op specifieke problemen die vastzitten aan FIOS-clausules in bevrachtingsovereenkomsten, alsook aan de manier waarop FIOS-clausules worden verwoord, geïnterpreteerd en ondergebracht in cognossementen waarbij een derde partij is betrokken. Dat wil zeggen: de bespreking in dit proefschrift dekt niet alleen de overdracht van ladingsgerelateerde handelingen van de vervoerder naar degene voor wie de lading zelf belangrijk is, maar ook de overdracht van scheepseigenaar naar degene die het schip chartert. Dit onderzoek laat met name zien hoe de rechtspraak de verwoordingen van de FIOS-clausule in termen als "onder supervisie van de opdrachtgever", of "onder de verantwoordelijkheid van de opdrachtgever", of "onder toezicht van de opdrachtgever", of "na goedkeuring door de opdrachtgever", enz. interpreteert. Ook laat dit onderzoek zien in welke mate de verwoording invloed heeft op de overdracht van verantwoordelijkheid voor de handelingen die op de lading betrekking hebben.

Ten slotte wordt in dit hoofdstuk een analyse gegeven van de relevante bepalingen van de Rotterdam Rules met betrekking tot de aanvaarding van de FIOS-voorwaarden, en geeft dit hoofdstuk een waardering van de benadering die wordt gevolgd door de nieuwe Conventie afgezet tegen degene die van kracht is onder de Hague Visby Rules.

Hoofdstuk IV: de vervoerdersverplichtingen voor dekladingen

Het vierde hoofdstuk concentreert zich op dekladingen, en met name op de daarvoor geldende verplichtingen van de vervoerder. De bespreking van de wetgevende en juridische zaken die de deklading betreffen worden in sectie 2 voorafgegaan door een uitleg over de begrippen dek en deklading en over de verschillende redenen en overwegingen om goederen te vervoeren op het dek van een commercieel koopvaardijschip.

Sectie 3 beschrijft vervolgens de dekladingssituatie onder de Hague/Hague Visby Rules, die aan deze situatie een uitzonderingspositie verleent, en verklaart waarom dergelijke vervoersovereenkomsten niet worden meegenomen in de nieuwe Conventie. De twee vereisten die zijn vastgelegd in Artikel I(c) HVR maken het mogelijk te onderscheiden tussen rechtmatig en onrechtmatig stuwen/laden van goederen op een dek alsmede tussen gemeld en ongemeld stuwen/laden, wat afhangt van de vraag of de goederen officieel zijn aangemeld als deklading of alleen de facto als deklading worden

vervoerd. De problemen die een Clause Paramount (cruciale bepaling die de HVR inroept en alle andere bepalingen teniet doet) met betrekking tot deze onderscheidingen in het leven roept, worden benoemd en verhelderd.

De huidige wetgeving die dekladingen regelt wordt beschreven in sectie 4 van dit hoofdstuk. Hierin wordt benadrukt dat nieuwe technologieën en moderne koopvaardijpraktijken de oude dekladingsleer hebben veranderd. Met het oog daarop is een feitenonderzoek gedaan om de risico's vast te stellen van de dekladingspraktijk, waarbij gebruik wordt gemaakt van statistische gegevens om de kans op ladingsverlies te kunnen bepalen. Het ontwerp van hedendaagse vaartuigen wordt ook meegewogen om te het standpunt te ondersteunen dat deklading ook een aspect van de koopvaardij is waarvoor geldt dat er een hiaat bestaat tussen het internationaal recht en de commerciële praktijk.

In sectie 5 wordt de ontwikkeling van de traditionele dekladingsleer onder Engelse wetgeving onderzocht, waarbij de vervoerder alleen dan goederen aan dek mag vervoeren als (1) er een uitdrukkelijke overeenkomst is tussen de betrokken partijen, of als (2) er binnen een bepaald handelsdomein een universeel gebruik bestaat om een dergelijke lading aan dek te vervoeren, een gebruik dat daarom voor de betrokken partijen bindend is. Verder wordt aan de juridische leer van de fundamentele schending/overtreding van een juridische bepaling en aan de redenen om ervan af te wijken een zorgvuldige beschouwing gewijd, vooral met het oog op de dekladingswetgeving. Hoe de Engelse rechtspraak omgaat met deklading die wordt beheerst door enerzijds een ongeclausuleerd en anderzijds een geclausuleerd cognossement wordt nader besproken in subsectie 5.2, met name het effect van vrijheidsclausules in de Engelse jurisprudentie.

Sectie 6 laat tevens zien hoe de dekladingspraktijk wordt beheerst onder andere jurisdicties. Om die reden worden de wetgevingspraktijken in Frankrijk, Duitsland, Nederland, Noorwegen en Zweden geanalyseerd en vergeleken. Het is van belang om op te merken dat deze sectie een grotere nadruk legt op het vergelijkende element wanneer we de problemen die elders worden besproken erbij zouden nemen. Dit is noodzakelijk omdat met betrekking tot de dekladingsproblematiek vaak wordt gesuggereerd dat expliciet gemelde dekladingen mogelijk buiten de werkingssfeer van de HVR zouden kunnen worden gehouden en worden doorverwezen naar geldend nationaal recht.

De laatste sectie van Hoofdstuk IV onderzoekt de dekladingssituatie onder de Rotterdam Rules. Deze sectie laat zien dat de ontwerpers van de nieuwe 'maritime plus'-Convention een moderne aanpak hebben gekozen die grotendeels is gebaseerd op eigentijdse koopvaardijpraktijken en tevens rekening houdt met onder Engels recht opgebouwde jurisprudentie die al werd besproken in de voorafgaande secties van dit hoofdstuk. Sectie 7 probeert daarom ook de voordelen te benoemen die de nieuwe Conventie in dit opzicht heeft.

Hoofdstuk V: Vervoerdersverplichtingen voor containervervoer

Hoofdstuk V is gewijd aan de eigenaardigheden van containervervoer in de context van ladingsgerelateerde vervoerdersverplichtingen. De ontwikkeling van het vervoer per container had een ongeëvenaarde impact op niet alleen de koopvaardij, maar – meer algemeen – op de internationale handel en zelfs op de sociale en economische

ontwikkelingen die het gevolg waren van de onomkeerbare veranderingen die het met zich meebracht voor de moderne tijd. Sectie 2 verschaft daarom uitgebreide informatie over de opkomst van de containeromwenteling in de tweede helft van de twintigste eeuw en over de geschiedenis en ontwikkeling van het containervervoer, alsmede het belang ervan voor de huidige internationale handel en koopvaardij.

Sectie 3 maakt vervolgens de lezer vertrouwd met bepaalde technische aspecten van de scheepscontainer, zoals de structuur ervan, de containertypen en het gebruik. Uitgebreid wordt ook ingegaan op de moderne containerschepen en de benodigde infrastructuur die een snelle verwerking van de in containers opgeslagen lading mogelijk maakt. De gedetailleerdheid van deze informatie is afgestemd op de relevantie ervan voor de juridische problemen die later aan bod komen.

De volgende sectie benoemt de eerste groep problemen die de hoofdmoot van dit hoofdstuk vormen. Dit betreft de problematiek hoe de vervoerscontainer begripsmatig moet worden beschouwd onder de Hague Rules en de Hague Visby Rules. In sectie 4 worden daarom expres de beslissende factoren benoemd die een rol spelen bij de bepaling of de aard van de vervoerscontainer deze onderdeel doet zijn van het vaartuig of van de lading. De vaststelling hoe containers worden beschouwd onder de Rules (bijvoorbeeld: in welke mate kan een container worden beschouwd als een pakket?) is van belang voor alle vervolgproblemen die rijzen met betrekking tot de regels voor deze gestandaardiseerde metalen of aluminium dozen.

In sectie 5 wordt gesteld dat het containervervoer ook veranderingen heeft teweeggebracht in het traditionele model voor de vervoersovereenkomst. Als gevolg hiervan wordt ook aandacht geschonken aan de verantwoordelijkheidstermijn die geldt voor de vervoerder alsmede aan de speciale kenmerken van doorvoercognossementen en cognossementen die gecombineerd vervoer regelen. De contractuele bepalingen die een bepaalde containerdienst vastleggen (bijv. de vervoerscodes die gebruikt worden bij het containervervoer zoals CY, CFS, LCL en FCL) worden ook uitgebreid behandeld en toegelicht.

In sectie 6 wordt speciale aandacht geschonken aan de verplichting die is neergelegd in Artikel III, regel 2 om *"de te vervoeren goederen naar behoren en zorgvuldig te laden, te verwerken, te stuwen, te transporteren, te lossen en ervoor zorg te dragen"* voor zover van toepassing voor het containervervoer. De toepassing van deze bundel van verantwoordelijkheden, waarnaar algemeen wordt verwezen als de taak om goed te zorgen voor de lading, wordt gedetailleerd onderzocht, zowel met betrekking tot de containers zelf als tot de erin opgeslagen lading. De implicaties van deze analyse laten zien dat de volgende factoren beslissend zijn bij de interpretatie van Artikel III, regel 2 in het geval containervervoer aan de orde is: welke partij levert de container, welke partij laadt de container, en wat zijn de contractuele bepalingen die de containerdienst vastleggen.

Een ander punt dat in dit hoofdstuk aan de orde komt is het probleem hoe de containers worden gewogen. Naar voren gebracht wordt het cruciale belang voor het stuwen/laden, voor de stabiliteit van het vaartuig en voor het gehele transporttraject, dat het juiste containergewicht wordt aangegeven op de vrachtbrief. Tevens wordt duidelijk gemaakt dat het wegen van de container een taak is die wordt geregeld onder SOLAS, en dat de ladende partij verantwoordelijk is. Dit houdt in dat de vervoerder geen

verplichting heeft om de containers te wegen voordat ze aan boord worden geladen, en evenmin impliceert Artikel III regel 2 zulk een verplichting.

De laatste sectie van Hoofdstuk V bespreekt de bepalingen van de Rotterdam Rules die betrekking hebben op containervervoer. Het regelen van containerverwerking zou een gebied moeten zijn waarop de Rotterdam Rules in hoge mate hun eigenschap als modern aansprakelijkheidsregime kunnen laten zien. Sectie 8 gaat nader in op de problematiek of containers moeten worden beschouwd als pakket of niet (Art.1.24, Art.1.26, Art.59), op de vraag wat de verplichtingen van de vervoerder zijn met betrekking tot containervervoer (Art.13, Art.14, Art.17.5), en ook wat de bewijskracht is van het cognossement met betrekking tot de containerinhoud (Art.40).

Conclusie

Het slothoofdstuk van dit proefschrift vat de waarnemingen en implicaties die voortkomen uit de verschillende besprekingen in de voorafgaande hoofdstukken samen (FIOS, deklading, containers), en trekt de conclusies daaruit. De meest algemene en opvallende bewering is dat een juridische leemte is geconstateerd tussen geldend recht en handelspraktijk in vrijwel alle gebieden die door dit proefschrift worden bestreken. Verder wordt ook gewezen op een opvallend gebrek aan uniformiteit tussen de verschillende juridische systemen onderling.

Nadat allereerst is gewezen op deze hoofdproblemen met betrekking dat de ladingsgerichte verplichtingen van de vervoerder onder de Hague Visby Rules, wordt in het slothoofdstuk geprobeerd om vast te stellen of de nieuwe oplossingen van de Rotterdam Rules in staat zijn om de kloof te dichten tussen wet en praktijk en of deze geschikt zijn om uniformiteit te bevorderen. Dit hoofdstuk weerspreekt de voordelen van de nieuwe Conventie niet; deze Conventie voldoet aan de commerciële behoeften binnen haar toepassingssfeer. Maar het is goed om erop te wijzen dat de oplossingen die worden aangedragen voor de specifieke problemen die in dit proefschrift behandeld worden, ook moeten worden beoordeeld in het licht van de overall-effecten die de Rotterdam Rules zal hebben op de gehele koopvaardij-industrie wanneer deze Rules geratificeerd en van kracht zouden worden. Met andere woorden: elke discussie over de Rotterdam Rules en het specifieke aandachtsgebied van de ladingsgerelateerde vervoerdersverplichtingen, moet ook in in aanmerking nemen de overall-tekortkomingen van de nieuwe Conventie, wat een onderwerp is dat de scope van dit proefschrift te buiten gaat.

In aanmerking nemend de hoge academische kwaliteit van het ontwerp van de Rotterdam Rules, wordt in overweging gegeven dat het dichten van de kloof tussen wet en praktijk met betrekking tot de ladingsgerichte verplichtingen van de vervoerder mogelijk wel bereikt kan worden met ratificatie van de nieuwe Conventie, maar dat dat toch niet een onmisbaar middel is tegen alle kwalen. Opgemerkt wordt dat er additionele problemen op andere relevante gebieden kunnen optreden als gevolg van de grote lengte en complexiteit van de Rotterdam Rules. Ten slot, de toekomstige modernisering en standaardisering van het internationale zeevervoer is mede afhankelijk van zowel de status als het inwerkingtreden van het nieuwe verdrag.

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Curriculum Vitae

Ilian Nikolaev Djadjev was born in Sofia, Bulgaria on 1 February 1986. After graduating from high-school (First English Language School, Sofia) in 2005, he continued his studies at the Faculty of Law of Sofia University "St. Kliment Ohridski", Bulgaria, where he obtained a bachelor's degree in International Relations in 2009. In the meantime, he also successfully completed a 4-semester programme in Company Management at the University's Center for Educational Services between 2007 and 2009. During his studies, he began working for a company in the real estate sector, but his longest professional relationship in that period is with the Sofia-based PR and communications company ICONA Communications, where he worked in the period 2007-2010.

In 2010, he began his studies at the University of Groningen, the Netherlands. He successfully completed the programme International Economic and Business Law in 2011. His master's thesis, written under the supervision of Dr. J.F. Appeldoorn and submitted in partial fulfillment of the requirements for the degree of Master of Laws (LL.M.), was in the area of competition law and entitled *"Resale Price Maintenance – a Condemned Practice Yielding Benefits?"*.

Shortly thereafter, in January 2012, Ilian Djadjev started pursuing his doctoral degree in maritime law at the Private International Law section of the University of Groningen. Under the supervision of Prof. Dr. Mathijs ten Wolde and Prof. Dr. Erik Røsæg (University of Oslo), Ilian worked for over four years on his PhD project dedicated to the carrier's obligations over the cargo under the Hague-Visby Rules. Throughout his doctorate programme, he also wrote three articles in the area of marine salvage, carriage of dangerous goods, and prevention of pollution from ships, respectively. Ilian Djadjev also obtained a Certificate of Achievement from the International Chamber of Commerce (ICC) for successfully completing a training course on the ICC Incoterms® 2010. At the time of publishing this book, he is practicing as a claimshandler at the Noord Nederlandsche P&I Club (NNPC).